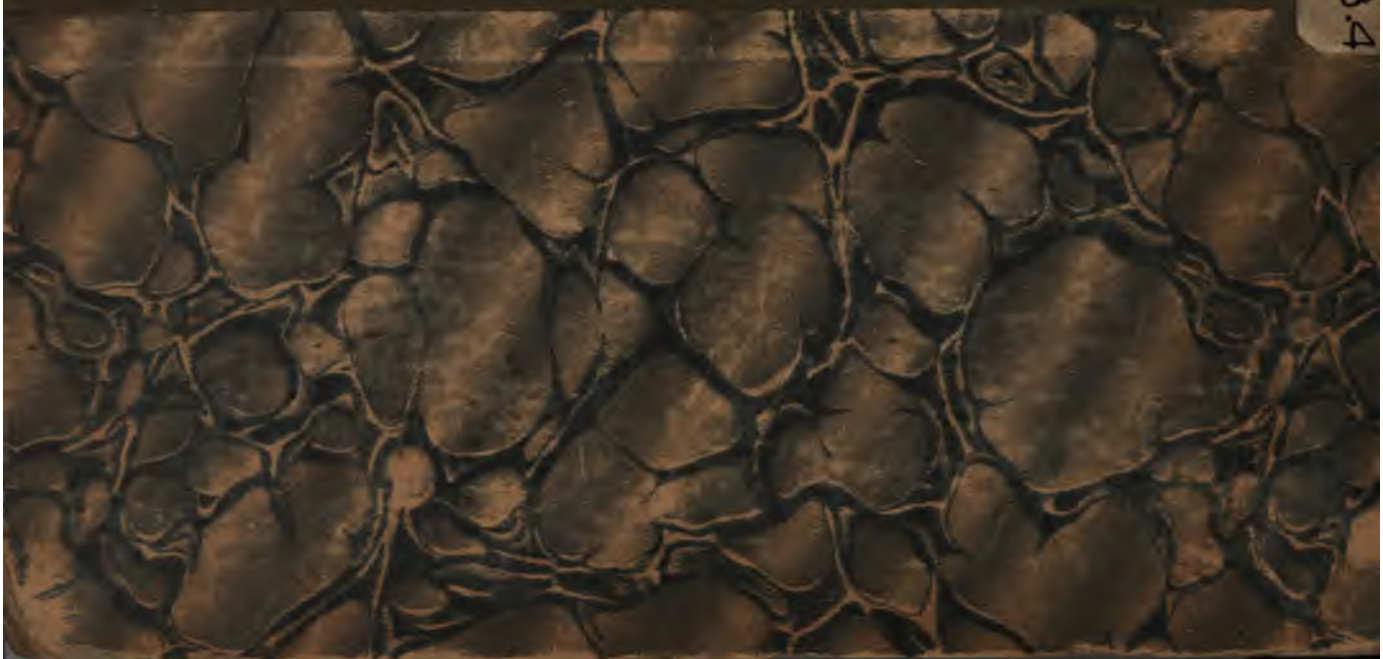

THE ELEMENTS

OF

ONSTITUTIONAL LAW.

BY

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FIRST STEREOTYPE EDITION.

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TABLE OF CONTENTS.

PREFACE.

THE idea of writing a commentary on the constitution of the United States, was first suggested to me by the following letter:

Philadelphia, May 6th, 1824.

SIR:—

Ever since your work issued from the press, it was my intention to give it a careful perusal, but my other studies, and my college duties, did not admit of it until within a few weeks past. Since your second edition was printed, I have purchased and read it with close attention, and I cannot refrain from expressing to you the pleasure which it has given me. Amidst the false taste and crude productions of the times, it is a real gratification to the American, who has at heart the literary reputation of his country, to find a writer who displays such clear views, just and profound comprehension of his subject, and such neatness and perspicuity of style. I have not made the subject a matter of sufficient study and reflection to be able to decide that your conclusions are always just or your principles correct; but I can determine, with perfect certainty, that your doctrines are always exhibited with unusual clearness, and supported by strong, masterly arguments. The work of Adam Smith is, undoubtedly, in many respects, a good one, and you have allowed him his full share of praise. Upon the points in which you differ from him, you have assigned good reasons for that difference, and have supported your own opinions with great ingenuity and success. The taste, too, discovered in the style, is no less com-

mendable than the good sense and profound reflections which are interspersed through the work. The fashionable style of the present times is that of perpetual glitter. Tinsel ornaments, and an endless verbiage now minister to the trade of book-making. Just views, solid thoughts, clear and neat expressions, are no longer sought, except by a very few. Our over-supply of periodical works and reviews, has contributed, and is still contributing, to foster and extend this false taste. Most of the contributors to these works have no thorough comprehension of their subject, and endeavor to make amends for their want of knowledge by splendid diction and glittering imagery, which impose upon the understandings and satisfy the crude appetites of the vulgar. I am happy to find that your work is entirely free from these faults. Its fame, I doubt not, will increase in proportion as it is read.

If you will allow me, I would suggest another subject to you for a volume, which might become very useful to your country. There is wanted, in our colleges and schools, a short and able exposition of the principles of the federal constitution. I would have each article of the constitution considered in turn, its history (if I may call it so) explained, the grounds upon which it was inserted, the political views which led to its introduction, and every other consideration connected with it, which would naturally suggest itself to the mind of a writer who was completely master of the subject. This object is, in some degree, accomplished in the Federalist, an excellent tract, but not entirely. That work has much in it which might be omitted in such a treatise as I propose, although it contains much also which might be incorporated with it. The Federalist, although suited admirably for the purpose for which it was composed, is not put into a form scientific enough for the purpose of a college manual. I merely suggest this for your consideration.

With great respect, believe me,

Your obedient servant,

FREDERIC BEASLEY.

When the above letter was received, the author felt himself wholly incompetent to write such a book as the letter suggested. He must be a bold, rash man, or a very heedless one, if the very idea of writing a commentary on the constitution of the United States, does not appal him. It is a field in which giants have labored; and if he succeeds in screwing his courage up to the point of undertaking the task, and has any regard for reputation, he will be heedful of every step he takes. Permit me then to say, that this is not an inconsiderate, hasty production; but it has been a subject of as intense thought as the author is capable of, not merely for days and weeks, but for months and years; and if it be not now, what it should be, it is not for the want of effort, but for the want of power. If it shall now prove useful to the rising generation, in assisting them to acquire a more perfect knowledge of our excellent constitution, than they otherwise would do, the author will have accomplished his object, and obtained his reward.

Cincinnati, February 26, 1845.

THE ELEMENTS

OF

CONSTITUTIONAL LAW.

CHAPTER I.

INTRODUCTION.

The formation and adoption of the constitution of the United States, was the commencement of a new era in the history of mankind. The Declaration of Independence, and the maintainance of that declaration, was comparatively a common, vulgar event; such an event as had happened many times before in the world, and may happen many times again, without causing any very material change in the current of human affairs; but, that a new-born nation, just emancipated from the thraldom of a foreign government—so sparcely scattered over such an immense territory, should, in the commencement of its existence as a nation, select some seventy or eighty of its wisest and best men for the purpose of forming a written constitution of government—that these wise men should assemble, and commence their deliberations, and should finally succeed in solving that great political problem of human government, which all the nations of the earth had in vain attempted to solve—that they should reduce this great problem to the practical form of a constitution—that this constitution should then be adopted by the people, and put into such successful operation as its warmest friends never anticipated; and finally, that it should, in the short space of half a century, have produced such a marked influence on the destiny of the human race, with every prospect that that influence will increase as time elapses, does, in my opinion, mark that event as the commencement of a new era in the history of man.

The great political problem to which I allude, and which is solved in our constitution, is the distribution of the sovereign pow-

er of the nation, in such a manner as to secure to the people all its benefits, and at the same time leave in their hands the means of preventing, or immediately correcting all its abuses. This is the great problem of human government, an ignorance of which has been the cause of half the miseries of the human race; and this problem was first solved by the convention that framed the constitution of the United States.

I do not mean to say that the convention are entitled to the whole merit of solving this problem; for the human mind, both in this country and in Europe, had for a century previous been gradually preparing for its solution. A great many fortuitous events and circumstances, also, contributed to its solution. It may even be, that the original colonial charters contained some of the seminal principles of the constitution; these seminal principles may have germinated in the colonial legislatures. The old confederation, also, although an abortive attempt to solve the problem, yet contributed essentially to its final solution. All these extrinsic aids the convention had; still it was they who first solved the problem.

But although the convention performed a great work, yet they did not do all that was necessary to be done; they left something for us, and those who shall come after us, to do. The constitution was not only to be put in practice, but its great principles were to be developed and carried out. To suppose that the convention had formed a perfect conception of the scope and powers of the constitution, which we, with all our advantages, cannot transcend, would be to degrade ourselves without exalting them. If we do not understand the constitution better than they who made it, then are we a degenerated race.

Political science, like all other sciences, is progressive, and, of course, each succeeding age ought to be wiser than the preceding. It would be a poor compliment to the steamboat builders of Cincinnati, to tell them that they knew as much about steamboat building as Robert Fulton, and a poorer compliment still, to a professor of astronomy of the present day, to tell him, that he knew as much about the heavens as Sir Isaac Newton.

The constitution, then, may not merely be what the convention have said, it was, nor even what they intended it, should be, or they may have expressed themselves very inaccurately, or *formed very erroneous* views of it: it may, in its terms, contain *contradictions* and absurdities, which cannot be in reality; but the

constitution *is* whatever it is in the nature of things—whatever *it is* in TRUTH. If it provides for impossibilities, those provisions are void; if it contains absurdities or contradictions, it must, in practice, be purged of those absurdities and contradictions. In short, it must be made to harmonize with TRUTH, and truth spurns human authority, be it ever so high.

The government of the United States was formed by design, and not by accident or casualty, as most other governments have been formed. It was also founded upon principles, and not upon prescription and authority, which are the two arms of the oppressor. Hence constitutional law is a science to be ascertained by the exercise of right reason, and not a set of arbitrary rules, like the common law, to be ascertained by authority. No subject can be dignified with the name of science, which is based upon human authority; for no amount of human authority can establish a truth either in physical or moral science. To say that a proposition in natural philosophy is true, because Sir Isaac Newton has said it was, would not be considered legitimate reasoning; and so to assert that a proposition of constitutional law is true, because this or that man, or this or that body of men, have said it was, is equally inconclusive. Whenever the time shall come that a question of constitutional law is to be settled by authority, then will the constitution itself be degraded even to a level with the common law, and will no longer be worthy the attention of ingenuous minds.

Authority is the refuge of weak and timid minds, that cannot or dare not think for themselves. That such a man *has said so*, is a sufficient reason for the great mass of mankind on all subjects, and it is no doubt best that it should be so, with those who have not the capacity or opportunity to think for themselves; but with those who aspire to assert the dignity of their nature and think for themselves, no amount of human authority will be deemed sufficient to establish a truth, either in moral or physical science. If the proposition is not true without the authority, it is not true with it.

It is not, however, to be inferred from this, that authorities are not to be consulted in investigating constitutional questions. The use of authorities is to corroborate principles, not to establish them. After a principle is established by the exercise of right reason, it may be strengthened and supported by authority, especially in the minds of those who have not full and entire confidence in their own judgments.

CHAPTER. II.

CONSTITUTIONAL LAW.

THE modern theory of governments is, that they are established by the people for their own use and benefit; and that it is the inherent right of the majority to determine the form of the government and the extent of its powers; and the minority is bound either to acquiese in the will of the majority, or leave the country. Upon no other principles can a free government ever be established.

All citizens in a free government are presumed, either expressly or tacitly, to have assented to, and adopted, the constitution under which they live. This presumption can only be rebutted by their leaving the country, or by a revolution; an unsuccessful attempt at revolution is rebellion.

A NATIONAL CIVIL GOVERNMENT is one whose laws operate directly upon the citizens individually, and can therefore be enforced by civil process.

A CONFEDERATION, OR LEAGUE, is a compact between political bodies or sovereign states, and is not therefore a civil government, because its laws can only operate upon the parties to the compact; and these parties being sovereign states, its laws cannot be enforced by civil process. It requires a sharper instrument than a *capias*, and a stronger arm to wield it than a court of justice, to enforce obedience from sovereign states. Hence the inadequacy of the old confederation to the purposes of national civil government. The laws of the old congress could not be enforced, and, therefore, the neccessity for a new organization.

A NATION is a community of men inhabiting a definite territory, exercising the right of national sovereignty, and bound together by the same government to which they owe allegiance.

A nation cannot exist without a territory, and this territory must be ascertained. The same rights of sovereignty appertain to each independent nation, except so far as the nation itself chooses to place a limitation in its constitution, upon its own powers of legislation. A nation cannot exist without a government. It is the government which binds the people together, and makes them a *unity or nation*. To this government the people owe allegiance, *because assent* implies allegiance, and no government (at least

no republican government) can exist without the assent and consequent allegiance of the people.

SOVEREIGNTY is the natural right which all men possess individually and collectively, to the free use of their own faculties for their own benefit. Sovereignty is either state or national. The powers exercised by a state government constitute state sovereignty, and those exercised by the national government constitute national sovereignty.

It seems to be a common opinion, that the rights of the national sovereignty are derived from the constitution; but this is both a fundamental and a capital error. The rights of sovereignty are inherent in the people—they are primary, and existed anterior to the formation of either the constitution or government. It is true that the rights and powers of national sovereignty are latent in the people, and cannot be exercised without a government, because there is no organ through which to exercise them; but it does not follow, that because the nation cannot act without a government, that therefore its power to act is derived either from the constitution or government. It might as well be pretended that because a legislative body cannot act without a presiding officer or speaker, that therefore its powers of legislation are derived from the speaker.

GOVERNMENT is the concentration of either the whole or some part of the sovereignty of the nation in one or more individuals, designated by the constitution to administer the government. If the whole sovereignty be concentrated in a single individual and his heirs, it is an absolute hereditary monarchy—if any portion of the sovereignty be concentrated in a body of hereditary nobles, it is *pro tanto* an aristocracy—if concentrated in representatives, periodically elected by the people, it is a republic. If the representatives are elected by a majority of the people, it is a Democratic republic.

The government is a constituent part of the nation, and not a separate and distinct body from it. This is not an unimportant postulate. We are too much in the habit of considering the government as standing in a contra-position to the nation, and as exercising authority and power over the nation; but this is an erroneous view of the subject. The government does not govern the nation, but the nation (at least a republic) governs itself through the instrumentality of the government. The government is the *mere organ or* mouth-piece of the nation, through which alone the

nation can speak or act. For all the purposes of legislation, and the exercise of national sovereignty, the government is the nation, in precisely the same sense that a man's hand is himself, for the purpose of executing a bond or signing his name. Whatever political power, therefore, the people or the nation possesses, the government can exercise; and it can exercise no other or greater power than what the people do possess.

Again, in a republic like our own, the power which the government, or any member of it, exercises, is *derivative*, and not *delegated*. There is a wide difference between derivative and delegated power. The former is spontaneous, and results from the nature and established order of things, and cannot be controlled or revoked. The latter is voluntary, and can be modified or revoked at the pleasure of the grantor or principal. An attorney exercises delegated power, which the principal can modify or revoke at pleasure. A member of congress exercises derivative power, which emanates from the people by virtue of the constitution; and which his constituents cannot modify or revoke. The political power with which a member of congress is invested, by virtue of his election, can neither be enlarged or abridged, neither against or with his consent, either before or after his election. Each and every member of each and every congress must possess the same political power, which would not be the case if the constituents of each member could exercise any constitutional power over him. If they have a right to control him at all, they have a right to paralyze him altogether.

The people do not delegate power to congress, or any member of it, but they have adopted a constitution and form of government, *through* which certain powers result—emanate—flow. And the people themselves are the source or fountain *from* which these powers result—emanate—flow.

The only way in which the people can constitutionally control the operations of their government, is by electing representatives who coincide with them in opinion. If a man would put a pine shingle roof upon his house, he must cut his timber from a pine tree, and not from a red oak. But although the constituent can exercise no constitutional *power* over his representative; yet if he be made of the common, flexible, popular materials, his *influence* over him may be very great—it will be in the inverse ratio of the intelligence, the integrity, and the independence of the representative. *In a popular* government, however, it is not to be expect-

ed that such stern materials will often be selected to represent the popular will.

A CONSTITUTION is a compact entered into by a majority of the people, for their own government. The minority is bound either to acquiesce in this compact, or leave the country. Hence a constitution binds the parties to it, and none others; as all citizens are presumed to be parties by their own express or tacit agreement. Each and every generation of the people are as much parties to the constitution, as they who originally adopted it.

Each individual citizen, as he arrives at the years of discretion, is presumed to adopt the constitution of his country, according to his own understanding of it. He is not bound to adopt it in the same sense, or to give it the same construction his father gave it, but is at perfect liberty to give it a construction for himself; because freedom of opinion upon all subjects, political as well as religious, is the inherent right of all men, of which no act of their ancestors can divest them.

As a constitution, then, binds the parties to it, and none others, the first inquiry is, who are the parties to the constitution of the United States? whose act and deed is it? I do not mean to inquire who performed the intellectual and mechanical labor of arranging and combining the letters of the alphabet in such a manner as to produce the instrument called the constitution; but who gave it vitality by breathing into it the breath of life? who adopted it, and thereby bound themselves by it?

It is a matter of perfect indifference who drafted the constitution and put it into its present form. Whether this labor was performed by a convention appointed in one way or another, is wholly immaterial, as the instrument remained a dead letter, until agreed to and adopted by the parties for whom it was prepared. Had the constitution been prepared by a voluntary association of statesmen in Europe, and sent to this country with a recommendation to the people to adopt it; and if in compliance with this recommendation the people had adopted it, it would, to all intents and purposes, have had the same validity it now has. Hence also, it is wholly immaterial in what sense the convention framed the constitution, or what they intended by its various provisions. The question is, in what sense did the parties adopt, ratify, and execute it? If the convention had one opinion of the meaning of the constitution, and the parties to it a different one, there can be no doubt *which should* prevail.

That the parties to the constitution, and not its framers, are its rightful expounders, is an undoubted truth; but it is not to be inferred from this, that great deference and respect is not to be paid to the opinions of the convention of their own work. That convention was a body of as wise men as ever were assembled for the purpose of deliberating on the most effectual means of promoting the happiness of mankind, and the opinion of such men on any subject is entitled to the greatest respect. Yet they were not authorized to give an authoritative construction to the instrument. This is the right of the parties, whether well or ill qualified. Although not one in an hundred of the people ever read the constitution, and not one in a thousand of those who do read it, will take the trouble, if they are even capable of understanding or forming an opinion about it, yet it is the undoubted right of every man to read it, and form his own opinion of it, or he may adopt the opinion of such other persons as he thinks proper.

One mode of ascertaining who are the parties to the constitution, is by reference to the instrument itself. The constitution provides (see Art. 7,) that "the ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same." It may here be observed, that the words *states*, as used in the constitution, generally means the *people of the states*, and not the state governments.

The convention also passed the following resolution:

"*Resolved*, That the preceding constitution be laid before the United States in congress assembled, and that it is the opinion of this convention, that it should afterwards be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention so assenting to, and ratifying the same, should give notice thereof to the United States in congress assembled."

In pursuance of this resolution, the constitution was submitted to, and ratified by, conventions elected by the people in each of the states. The formal ratification of the instrument also, is in the name of the people, not of the respective states, but of the United States. "We, the people of the United States, in order to form a more perfect union, &c. do ordain and establish this constitution for the United States of America." In legal effect this *precisely the* same as though the people had individually assented *to, and subscribed* their names to the constitution itself. The

stitution was never submitted to, or ratified by, any state legislature. Hence it follows, that the people alone, in their individual capacities, are the parties to the compact, and they alone are bound by it.

In opposition to this doctrine it is contended, by some, that the states, in their sovereign or political capacities, as contradistinguished from the people, are also parties to the constitution.

This doctrine makes the government a confederacy or league, instead of a national civil government. If the states are parties, they have a right to construe the constitution for themselves, and to judge when its provisions are violated, and this right belongs to each successive legislature. If the states, in their political capacities, are parties to the constitution, it is not only the right, but the duty of the state legislatures, to oppose the execution of every act of congress, which they believe to be unconstitutional. It is the natural, inherent right of every party to a compact, to judge of its obligations, and to resist what he believes to be an erroneous construction of it. Hence results the doctrine of nullification.* If the states are parties, then nullification is a sound, legitimate doctrine.

These two theories of the constitution are in direct conflict, and cannot stand together; for the legislature of a state may give one construction to the constitution, while the people of the same state may give it a directly opposite construction. If, then, the people are parties, the states are not, and if the states are parties, the people are not.

If the states are not parties, it is a high-handed act of usurpation, for the state legislatures to attempt to thrust themselves into the constitution of the United States, as parties, and as great a *misnomer* to call the government a *confederacy*, as it would be to call it a *monarchy*.

Upon what ground, then, do the states, in their political character, claim to be parties to this compact? The constitution has never been submitted to them for their adoption, nor has any state legislature ever presumed to adopt it.

The only ground upon which they claim to be parties, is the equal representation of the states in the senate, and the fact, that the senators are appointed by the state legislatures. Hence it is

*The word nullification is a modern barbarism, used to designate the right of a state to render null and void an act of congress within the limits of the *state*.

inferred, that the senators are the representatives of the state legislatures, and, therefore, the said legislatures are parties to the constitution; most assuredly a far-fetched conclusion! It might, with as much propriety, be maintained that the president of the United States is the representative of the electoral colleges, and not of the people of the United States: or that the counties, in their political character, are parties to a state constitution, because they have an equal representation in one branch of the legislature.

It would seem to be a much more legitimate mode of reasoning, to suppose, that for this purpose, the state legislatures are electoral colleges, appointed by the people to elect their senators, and that the senators are therefore the representatives of the people of the several states, and not of the legislatures, as contradistinguished from the people. This theory makes the constitution harmonious and consistent with itself, and puts an end to the doctrine of nullification.

As no man is bound to adopt either the religious or political opinions of his father, it follows, that no man is bound to give the constitution the same construction which his father gave it. Each individual citizen has, therefore, a perfect right to read and understand the constitution for himself, subject, however, to the will of the majority, when expressed in the constitutional mode; and that which it is the right of each individual citizen to do, it is the right of the nation to do. Hence it follows, that each generation has a right to construe the constitution for itself, and is not bound by the construction given to it by its predecessors or ancestors. Hence, one generation may think a protective tariff constitutional, and legislate accordingly—the next generation has a perfect right to think differently, and reverse the policy. One generation may think it unconstitutional for the government to engage in a system of internal improvements—the next generation has a perfect right to reverse the opinion and act accordingly. In other words, the constitution of the United States is just what a constitutional majority of the people, at any particular time, may happen to think it is. A constitutional majority is a majority of the whole people of the United States, and also a majority of the people in a majority of the states. It is, therefore, a double majority. In legal effect, the opinion of a constitutional majority is precisely equivalent to the unanimous opinion of the whole people.

The opinion of a constitutional majority is always presumed to *be the honest* and conscientious opinion of such majority, and

not a perverse and wicked opinion. It cannot be supposed that a majority of the people will ever, from wicked motives, give the constitution a construction contrary to its plain and obvious meaning and import. They will give the language used a fair construction with reference to the subject-matter—the end and object of the instrument. If it could be supposed that a majority of the people would ever be wicked enough to pervert the meaning of the language used in the constitution, for the purpose of accomplishing some oblique and sinister design, it would be useless to make a constitution; for no language that could be used would be strong enough to bind a wicked and perverse generation, who were determined not to be bound. There have been, and will be again, honest differences of opinion respecting the meaning of certain parts of the constitution; and whichever way the questions have been or shall be decided, they must be presumed to be decided honestly and conscientiously.

Having ascertained who are the parties to the constitution, the next inquiry is, what is its true construction? what its true import and meaning? The constitution, like every other written instrument, is to be construed with reference to the subject-matter. The whole instrument must be taken together, and the language must be taken according to its plain and obvious meaning, and not according to any subtle refinements. In making constitutions, however, the people cannot do impossibilities, or reconcile contradictions.

I will endeavor, in the first place, to ascertain what the constitution is *not*, and my first proposition is, that the constitution is not an *enabling* instrument; congress exercises no power whatever by virtue of any grant contained in the constitution.

As this proposition is directly opposed to the commonly received opinion, it requires to be examined with care and caution; but I am much mistaken if it be not susceptible of invincible demonstration.

It is admitted by all, that national sovereignty resides *with*, and emanates *from* the people. It is also admitted that congress can exercise no power except what it derives from the people; and it must also be admitted that whatever political power the people do possess, they can exercise through the instrumentality of congress; for it would be a contradiction to say, that the people possess a power which they cannot exercise. It is equivalent to saying, they possess a power which they do not possess; but the

people, in the aggregate, that is the nation, can exercise no political power whatever, except through the instrumentality of congress. Hence it follows, that whatever power the people possess, congress can exercise, and for the people to grant power to congress, is percisely equivalent to granting power to themselves. But it is an axiom—a self-evident proposition—that a man can take nothing by a grant from himself; neither can the people take anything by a grant from themselves. A man cannot grant what he does not possess, and if he does possess it already, the grant to himself is a mere act of supererogation, and inoperative. Hence the conclusion is inevitable, that the rights and powers of national sovereignty are not derived from the constitution, but existed in the people anterior to the formation of that instrument; and the only effect of the constitution is to establish the *mode* in which these powers shall be exercised. Those clauses, therefore, which profess to grant power to congress to legislate on certain subjects, such as to lay taxes—coin money—raise and support armies—declare war—make peace—regulate commerce, &c. &c. are mere acts of supererogation, and inoperative. They do nothing more than render certain those things which, to common apprehension, were before somewhat doubtful. All these powers were possessed by the people in their full force anterior to the formation of the constitution; but in order to exercise them, it was necessary to have a government through which to exercise them: and as soon as the government was established, these powers necessarily resulted to the government.

A more self-evident proposition cannot be conceived, than, that a national government cannot exist without possessing the powers and attributes of national sovereignty. It is perfectly manifest, therefore, that these powers cannot be derived from any constitution whatever; and if the constitution of the United States were to be destroyed to-morrow, these rights would still exist in all their force, although it might not be possible to exercise them until the formation of some other government. Hence also it follows, that the tenth amendment to the constitution, which declares that "all powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," is a manifest solecism, without sense or meaning.

As the constitution is not, therefore, an *enabling* instrument, let *us inquire, in the* next place, what it is.

The constitution of the United States may be arranged under the four following heads:

1st. That part which relates to, and establishes the form of the government.

2d. That which relates to, and limits its power.

3d. That which relates to, and limits the power of the state governments.

4th. That part which is *declaratory* of the powers which congress shall or may exercise. This part has usually been considered in the light of a grant; but as all power is inherent in the people,—and as the possession of power implies a capacity to use it—and as the people cannot use it, except through the instrumentality of congress, it follows, that the power of the people, and the power of congress, are convertible terms, and, therefore, a grant is supererogatory and inoperative.

The first part prescribes the manner in which the president, vice-president, and the two houses of congress shall be elected; their qualifications, and the periods of their election. It also prescribes the mode in which they shall exercise their executive and legislative powers. This may be called the *formal* part of the constitution, and comprises more than four fifths of the whole instrument. It is that part which establishes the republican form of government, and is, therefore, the most important part. Upon this part of the constitution no material difference of opinion has ever arisen.

The second part, which relates to, and limits the power of the government, has given rise to all, or nearly all, the constitutional questions which have divided and distracted the country. This may be called the *debatable* part of the constitution, to the true construction of which, the public will is the index. It is true, the declaratory part of the constitution has given rise to much discussion, but it was upon the principle of its being a grant of specific powers, and, therefore, an exclusion of all other powers, according to the legal maxim, *expressio unius est exclusio alterious.* The real question, however, is, and always must be, what are the constitutional limitations on the power of congress?

It would be presumption for any commentator to attempt to establish the true construction of the debatable parts of the constitution. It has, and will, no doubt, at different periods, receive different *constructions*; and each construction will, for the time be-

ing that it lasts, be the true one, because it will be the construction of a constitutional majority of the people, which is the supreme law on all doubtful and debatable questions.

What construction, then, will the people, according to the known laws of human action, be most likely to give to this part of the constitution? Will they give it a large and liberal construction, in furtherance of their own power to promote their own welfare? or will they give it a narrow and strained construction, in limitation of their own power?

A broad and liberal construction leaves the people of each generation at liberty to adopt such measures as they may think will promote their own interests, while an illiberal and narrow construction may deprive them of a valuable portion of their liberty. I think, therefore, we may take it for granted, that, as a general rule, the people will give the constitution a broad and liberal construction.

Whenever, therefore, the people shall be of opinion that a protective tariff, or a system of internal improvements, carried on by the national government, will promote their own welfare, they will be very apt to find sufficient authority in the constitution for adopting these measures—they will be very apt to consider the constitution a *restraining* and not an *enabling* instrument, and they will look into it, not for the purpose of ascertaining what congress, or in other words, *themselves* may do, but for the purpose of ascertaining what they may not do; and if they find no positive restriction in the constitution, they will be very apt to adopt the measure they think calculated to promote their own interest, whatever that measure may be.

It seems very natural to suppose, that all written constitutions, after establishing the form of the government, are made for the purpose of restraining the exercise of legislative power, and not for the purpose of enabling legislative power to act. Government, we have seen, is the concentration of the whole, or some portion of the sovereignty of the nation. If the government possesses the whole sovereignty, it is absolute—if a part only, it is limited; and if it be limited, it seems natural to look into the constitution for the limitation; and if none be there found, relating to the particular subject in controversy, the people will be very apt to conclude that they possess the power in question, and *possessing* it, they will be very apt to exercise it; for whatever the people conceive they have a right to do, to promote their own

welfare, they will take especial care to have done, by electing men to congress who will do *their will.*

It is a wise provision in the constitution, that a double majority is necessary to pass a law. There must be a majority of the whole people of the United States. The House of Representatives is the index of this majority. There must also be a majority of the people in a majority of the states. The Senate is the index of this majority. Hence it results, that a majority of the people in one-half of the states, which may be less than one-fourth of the whole people in all the states, may prevent a law from being passed.

This, together with the president's veto power, is ample security against hasty and inconsiderate legislation—against encroachments by the national government upon the rights of the state sovereignties, and also against encroachments by majorities upon the rights of minorities.

In forming a republican constitution it should be a cardinal principle, that a constitutional majority should never be less than an actual majority of the whole people. This principle has been abundantly adhered to in the constitution of the United States; but it has been entirely disregarded in the constitution of Maryland, where a small minority composes a constitutional majority, and can pass laws in opposition to the will of a large majority. This is a gross departure from the fundamental principle of a republican government, and if the evil cannot be corrected in any other way, the majority has an undoubted right to correct it by force. That a majority of the people is bound to submit in perpetuity to be ruled by a minority, is as gross a solecism as the old exploded doctrine of the divine right of kings.

Representation, according to population, in one branch of the legislature, secures a constitutional majority always to be an actual majority, and then no law can pass without the assent of, at least, an actual majority of the whole people.

All restrictions in constitutions are for the protection of minorities—the majority needs no protection from the constitution, as they are abundantly able to protect themselves, having the political power in their own hands; but as political power is exceedingly fluctuating, and the majority of this year will probably be the minority next, it is exceedingly important that all the fundamental principles of civil liberty, belonging to whatever party, should be carefully protected by the constitution. Hence the

rights of conscience—the freedom of speech—the liberty of the press—the writ of *habeas corpus*—and other personal rights essential to the enjoyment of civil liberty, are placed by the constitution out of the reach of the government. A casket containing the jewels of civil liberty is deposited in the citadel of the constitution, where they are safe from every thing but the madness and violence of party rage.

According to the foregoing theory, then, all written constitutions, after establishing the form of the government, are made for the purpose of restraining the exercise of sovereign or legislative power, and not for the purpose of enabling such power to act. Such has been the practical construction of the constitution of the United States, from the day it went into operation—many of the laws passed by congress relate to subjects not mentioned in the constitution—and some of them to subjects of which the members of the convention had never heard or thought.

The commonly received opinion, however, has been, that the constitution is an enabling as well as a restraining instrument; and therefore, before congress could rightfully legislate upon a given subject, it was necessary to show a specific grant of power for that purpose. Those who hold this doctrine will undoubtedly oppose the foregoing theory, upon the ground that it tends to *consolidation*, and endangers state rights; but if they cannot oppose it by a stronger argument than this, it is a clear proof that the theory is a sound one. If the people are in favor of consolidation, who has a right to object? Shall the state governments—the creatures of the people—make objection? Such an objection might be tolerated in that code which recognizes the divine right of kings, but not in a republic.

But what is consolidation? To the imaginations of certain people, it seems to be a word of terrific import, and yet consolidation is neither more nor less than *union*, either complete or partial. The convention that framed the constitution, in their letter addressed to the congress of the United States, make the following declaration:—"In all our deliberations on this subject [the constitution] we kept steadily in our view that which appears to us the greatest interest of every true American, the *consolidation* of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence." The constitution then was formed for the express purpose of consolidation, and its adoption was *a partial* consolidation of the states into one nation. The annihi-

lation of all the state governments, while the national government continued to exist, would be a complete consolidation.

The adoption of the constitution was a consolidation with regard to all our foreign relations—with regard to both the army and navy. The united or consolidated states has but one diplomatic head—but one army—but one navy. Consolidation has also taken place in regard to our commercial marine. The Union has but one system of revenue laws and custom-houses—but one system for the registry of all vessels. The states are also consolidated with regard to their public domain—with regard to post offices, post roads, and mails—with regard to naturalization, and they were for a few years consolidated in regard to bankrupt laws; but the people have determined that they will have no consolidation on that subject. The constitution also expressly provides for a consolidation on the subject of money; but the minority of the people have hitherto baffled and defeated the will of the majority on this subject. It is generally admitted, also, that a consolidation ought to take place on the subject of weights and measures. One uniform system of weights and measures, throughout the Union, is certainly a great desideratum, and will, no doubt, some day take place. And so there will continue to be consolidation on one subject after another, as experience and wisdom shall suggest. Whenever the people shall find by experience that consolidation n a particular subject is not conducive to their welfare, they will repeal it, and restore the suject to the legislation of the state governments, as they have already done on the subject of bankruptcy.

There is not, therefore, any thing so terrific in consolidation as has been represented. Those only see danger in it who are unwilling that the people should manage their own affairs in their own way, and therefore they attempt to frighten them with the chimera of consolidation. The apprehension of a complete consolidation, by the destruction of the state governments, is the absurdest of all political hobgoblins. What danger can there be of such a consolidation, when not one in a million of the people are in favor of it? The state governments are more than a match for the national government, and always will be. The members of the national government are all the sons of the states—their affections and attachments are centered in the states, and it might as well be feared that the members of congress would pass a law to *oppress and injure* their own natural mothers, as that they will

pass a law to oppress and injure the states. Besides, the body of social and civil rights entrusted to the state governments is vastly greater and more interesting to the people, than those entrusted to the national government, (although the latter may make the most noise and show,) for the same reason that a man's own domestic family affairs are of more interest and importance to him than public affairs. There is no danger, therefore, that the affections of the people will ever be transferred from the state to the national government. The latter, the great mass of the people never see nor feel—they know nothing about either the government or its members, except what is exhibited to them through the press; and the characters exhibited to them there, excite about as much of their interest, as the characters exhibited in a show-bill. But the state governments come home to their bosoms and their families. The people look to them for the protection of private property—their domestic relations—their lives and characters, and for every thing which is near and dear to them in civil society. To fear that such governments are in danger of being encroached upon or swallowed up by the national government, or in other words, by the people themselves, is the pinnacle of absurdity. The danger lies entirely in the opposite direction—the danger is, that these causes will prevent consolidation from taking place, to so great an extent as it ought to take place, for the good of the people.

We will next inquire whether the supreme court possesses any power to control the people in the exercise of their sovereign powers of legislation.

The constitution provides that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority." The constitution then proceeds to specify in what cases the supreme court shall exercise original and appellate, exclusive and concurrent jurisdiction, with the inferior and state courts. But the preceding clause is the one, if any, that gives the court jurisdiction over the constitution and laws of the United States. The question then arises, does the supreme court, by virtue of the clause recited, exercise jurisdiction over the constitution and laws of the United States? and if so, to what extent?

Courts of justice are established for the purpose of executing the laws of the government, in whole or in part, and for no other

purpose. A court cannot execute the laws of the government without having jurisdiction of those laws, either general or special. If general, it has jurisdiction over all the laws—if special, of a part only. Hence it follows, that the jurisdiction of the supreme court over the constitution and laws of the United States, is *incident* to the court, and arises solely out of private litigation, and does not depend on the grant in the constitution. The very act of establishing the court necessarily gave it jurisdiction of the constitution and laws of the United States; and the grant of jurisdiction was therefore as unnecessary and useless, as it is for a man to have two deeds from the same party, of the same tract of land.

If jurisdiction of the laws which the court is appointed to execute is incident to the court, so is jurisdiction of the constitution; because the constitution is the paramount organic law, which cannot be repealed; and for the same reason, all courts, state as well as United States, must take cognizance of the constitution and laws of the United States, because they are "the supreme law of the land," which the judges have sworn to obey, and which they are bound to obey, independent of their oaths.

It is an axiom, that two incompatible laws cannot exist in the same code: and in regard to statute law, it is a maxim, that if two acts are imcompatible, the last act repeals the former; but in regard to the constitution this rule is reversed. If the constitution and a law be incompatible and irreconcilable, then the constitution repeals the law, or rather makes it void *ab initio*. Hence the right, or rather necessity of the supreme court to declare an act of congress unconstitutional, upon the ground that it is incompatible and irreconcilable with the constitution. But as the court is bound to reconcile all laws, if practicable, so also is it bound to reconcile the constitution and the laws, if possible. The court will not, therefore, upon doubtful and debatable grounds, declare an act of congress unconstitutional.

After a constitutional majority of the people have passed a law, upon the ground that the constitution contains no limitation of their power, it would be a bold and hazardous experiment for the supreme court to decide, upon doubtful and debatable grounds, that the law was unconstitutional. If the constitution contains an express limitation or restriction, it cannot be supposed that congress would pass the law, unless through inadvertence, and then it would be no law. If there be no express restriction, to suffer the supreme court to impose one, would be suffering the court to alter

and amend the constitution, instead of expounding the laws made under it.

It is an axiom, that there cannot be two supreme wills in the same government; but, if upon subjects where the constitution is silent, and therefore imposes no limitation on the power of congress, as in the case of the purchase of Louisiana—chartering the Bank of the United States—making internal improvements—distributing the surplus revenue or the public lands among the states, the supreme court was permitted to impose a limitation, and say, that congress could not purchase territory—charter a bank—distribute the surplus revenue or the public lands among the states, it would follow, that the legislative *will* of the people, was subordinate to the judicial *will* of the court.

The true doctrine, however, appears to be this—when the constitution and the law are in conflict, the constitution must prevail, and the law is null, and it is the duty of the court, when the question comes before them, to say so. But upon subjects where the constitution is silent, as in the preceding examples, there can be no conflict between the constitution and the law, and therefore the *will* of the people is the supreme law, and the court is bound to sustain it. It is only when the constitution and the law are in conflict, that the court is authorized to declare the law unconstitutional, and there can be no conflict where there is no antagonist principle; and where there is either no constitution or no law, there can be no antagonist principle; and upon subjects where the constitution is silent, there is no constitution, and therefore the will of a constitutional majority of the people comes in as the supreme law, upon the principle that it is the right of such majority to rule. It is their right to make the law, where there is no limitation of their power.

The supreme court have, in fact, laid down this principle in the case of McCulloh *vs.* The State of Maryland, (reported in 4 Wheaton.) The court there say, "Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution, or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But *where the law is* not *prohibited*, and is really calculated to effect *any of the objects* entrusted to the government, to undertake to

inquire here, into its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Congress is the organ through which the people manifest their will. The construction, therefore, which congress gives the constitution, is presumed to be the construction given to it by the people; and this presumption cannot be rebutted. The people have a right to change their opinions, and therefore congress has a right to give one construction to the constitution at one time, and a different one at another, and both are politically right, provided they are not in conflict with other parts of the constitution. If in conflict, the law that may be passed will be void, and it will be the duty of the supreme court to say so, whenever the question comes before them.

The constitution is silent upon a great portion of the constitutional questions which have hitherto divided and agitated the country, and therefore it was competent for the people to decide the questions as they pleased, and their decision was right which ever way decided. The constitution is silent on the subject of chartering a United States' Bank. It was, therefore, competent for the people to decide that they had the power to charter such a bank. At a subsequent period it was competent for them to decide, and they did decide, that they had not the power, and both decisions were right. Again, the constitution is silent as to the acquisition of territory, by purchase. The people decided that they had a right to purchase Louisiana, and the decision was right. This decision, it is true, cannot be reversed, because it vested certain rights which cannot be divested; but it is competent for the people hereafter to decide, that they have no constitutional power to purchase another territory, and that decision will also be right, and the supreme court cannot reverse it. So the people have decided that they have the constitutional power to distribute the surplus money in the treasury among the states, and they may hereafter decide that they have no such power, and both decisions will be right, because the constitution is silent upon the subject, and there is, therefore, no conflict between the constitution and the laws, and, therefore, the supreme court cannot interfere. The people have decided that they have a constitutional right to protect the industry of the country by a protective tariff; and should they hereafter reverse this decision and repeal all the

tariff laws on the statute book, however disastrous it might be to the best interests of the country, no one would have a right to gainsay their decision or question its constitutionality. VOX POPULI, VOX DEI, is for the most part, a sound maxim in politics; but in religion and morals the maxim is, VOX POPULI, VOX DIABOLI—the popular cry has ever been, Crucify him! crucify him!

That great political, ideal being, called the PEOPLE, is a singular compound of heterogeneous attributes and properties. All the wisdom and folly—all the virtue and wickedness—all the intelligence and stupidity that "flesh is heir to" belong to him. Although composed of millions of little mortals whose life is but a span, he is himself immortal. His origin is in the ages of antiquity which cannot be traced—his destiny in the dark abyss of a thousand years.

Some eminent jurists say, that as the constitution of the United States is but one instrument, but one right construction can be given to it while it lasts; and therefore, if one construction is given at one period, and a different one at another, one of the constructions must necessarily be wrong.

This proposition, taken in the abstract, is theoretically true, but practically it is not true. If we had an infallible standard, by which to test the constitution, it might be true practically; but as the constitution is to be tested by the fallible standard of man's judgment, it must vary, as the standard by which it is tested varies. It will be sometimes longer and sometimes shorter, as the intellect which measures it is expanded or contracted. One congress may be of opinion that it is unconstitutional to make appropriations to improve the navigation of the Ohio and Mississippi rivers, and of course it would be unconstitutional for that congress to make such appropriations. Another congress may be of opinion that it is constitutional to make such appropriations, and of course it would be constitutional for that congress to make them. The constitution is to each and every man what he thinks it is; and to each and every generation of men, what they think it is, and as different men have different degrees of intelligence, so different generations of men may have different degree of intelligence; and so the constitution may come to be a very different thing in one age, from what it was in a preceding one.

The constitution was made and adopted for the use and the benefit of the people of the Union, and it was designed to promote *their happiness*; not merely of one generation, but of each and

every successive generation, to the end of time. Now it is clear that the interests of different generations may be very different; and it must be admitted that each generation is the best judge of its own interests. A system of measures, therefore, which may be very beneficial to one generation, may be very prejudicial to another; and if it were necessary to "follow in the footsteps of our ancestors," and to give one uniform construction to the constitution, throughout all time, it would soon prove to be a curse to the people instead of a blessing. It is, however, useless for commentators to talk about what the people ought to do. The question for them to discuss is, what will they do? what construction will they give the constitution? And we may be very sure, that, upon subjects where the constitution is either silent, or its language doubtful, and therefore liable to different constructions, the people will not persevere in giving it a construction which they find by experience to be prejudicial to their own interests. In a republican government, where the people govern themselves, the more power the government possesses, the more liberty the people possess. It is an entire mistake to suppose, that restraining the power of the government enlarges the liberty of the people.

If the people of the Union think proper to make use of the government of the Union, for the purpose of collecting a revenue, to be distributed among the states for the benefit of the people, they have a perfect right to do so; and if they find this the most convenient and best mode of collecting a revenue to defray the expenses of the state governments, they will do it. Both the national and state governments belong to the people, and they have a right to use them for their own benefit.

Let it ever be remembered that constitutions are made for the people, and not the people for the constitutions. In other words, all doubtful questions should be decided in favor of the public liberty. Upon a doubtful and debatable question, to sacrifice the welfare of the people, to a vain reverence for the constitution, would be to make the object subordinate to the means designed to accomplish it—it would be, to strain at a gnat and swallow a camel. But where the constitution is clear and explicit, it should be adhered to, without regard to consequences. The constitution may be amended, but it should not be violated.

CHAPTER III.

THE THIRTY-NINTH NUMBER OF THE FEDERALIST, OR THE NATIONAL AND FEDERAL FEATURES OF THE CONSTITUTION.

THE number of the Federalist which heads this chapter, is attributed to Mr. Madison, who is sometimes called the father of the constitution. It is by far the most important number in that celebrated work. It discusses the fundamental principles—the very trunk of the constitution, whilst most of the other numbers merely discuss some of its branches and foliage, or mere ephemeral objections, which ceased to be of any interest, as soon as the constitution was adopted.

There are a good many truths, mixed with a good deal of error, in this number, and the high authority of Mr. Madison as an expounder of the constitution, has caused the whole to pass into the public mind as text law. Hence the great importance of analyzing the article, and of separating the truth from the errors, and thereby correcting the erroneous impressions it is calculated to make upon the mind of the reader.

In order to form a just estimate of this celebrated number, it is necessary to consider the time and circumstances under which it was written, and the object Mr. Madison had in view in writing it.

It was written while the question was pending before the people, whether the new constitution should be adopted or not. There was a powerful party, both as to numbers and talents, opposed to its adoption, mainly upon the ground that it would be a *national* and not a *federal* government. The prejudices of the people were supposed to be in favor of a federal, and opposed to a national government. If the adversaries of the new constitution succeeded in establishing the fact, that the government would be national and not federal, it was apprehended, that the people would reject it. Mr. Madison's object, therefore, was to confound his adversaries, and prevent them from establishing this fact. His object was to show that the constitution was federal as well as national, and this question he managed with consummate ability. He succeeded in confounding the adversaries of the new constitution, and thereby prevented them from prejudicing the people against it. What part, or how much of the constitution was federal, and how much national, was not the business of Mr. Madison *to show.* He therefore asserted, and maintained with great

ability, that the constitution would be federal in its adoption—that it would, in some respects, be federal in its action, and in the mode of amendment.

That Mr. Madison should, under such circumstances, push his argument much beyond the truth, is not surprising. If ever there was an occasion which justified an advocate in confounding his adversaries with sophisms, that was the occasion, and after the occasion is passed by, and the constitution is adopted, it is hardly fair to hold Mr. Madison responsible for the soundness of his argument. This explanation, I trust, will acquit me of any charge of presumption, in criticising some of Mr. Madison's positions and argument, upon the nature and character of the constitution.

Before I proceed to do this, I will lay down the following proposition, which, if it be not self-evident, is at least susceptible of demonstration.

A government cannot be national and federal in its action upon the same subject. Congress cannot pass a law which shall operate upon the states in their political capacities, and upon the people in their individual capacities, at the same time. Congress may pass a law upon one subject, which shall operate upon the states, and a law upon another subject, which shall operate upon the people individually; but the same law cannot act upon both at the same time. A government, therefore, may be federal in regard to one subject, and national in regard to another, but it cannot be both federal and national upon the same subject at the same time.

Mr. Madison defines a republic to be "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." This is a correct definition of a republic, and the government of the United States comes clearly within it. "The house of representatives is elected immediately by the great body of the people. The senate derives its appointment indirectly from the people. The president is indirectly derived from the choice of the people."

"But," continues Mr. M., "it was not sufficient, say the adversaries of the new constitution, for the convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form, which regards the Union as a confederacy of sovereign states; instead of which, they have framed a nation-

al government, which regards the Union as a consolidation of the states."

This was the great objection to the constitution, and the amount of it was, that the government ought to have been a federal one, or a confederacy of the states, and not a national one, for both it could not be upon the same subject.

Mr. Madison also says, "in order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

"On examining the first relations, it appears, on one hand, that the constitution is to be founded on the assent and ratification of the people, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be by the people, not as individuals composing an entire nation, but as composing the distinct and independent states to which they respectively belong. The act, therefore, establishing the constitution, *will* not be a national, but a federal act."

This is certainly a *non sequitur;* for it may, with as much propriety, be said to be the act of the people in their individual capacities, as the act of the states in their political capacities. The act itself is susceptible of either construction, and, therefore, its character must be ascertained by some other test—some other consideration. The surest, and, indeed, the only test of the character of a government, is its *action.* If the government be national in its action, the inference is a very strong one, that it was national in its adoption. It is wholly immaterial, however, in what way the government was formed, or in what way the constitution is to be amended, but the important question is, in what way does it act? Even if formed on the federal principle, still all its actions may be on the national principle; which would make it a national government.

The truth is, the constitution was adopted in accordance with its character. That part of it which is national, was adopted by the people, in their national character, and that part of it which is federal, was adopted by the states or the people of the states, in their federal character. With that part which is national, the states, in their political character, have nothing to do, as they are *not parties.*

In relation to the sources from which the ordinary powers of the government are to be derived, Mr. M. says, "the house of representatives will derive its powers from the people of America. So far, the government is national, not federal. The senate, on the other hand, will derive its powers from the states, as political and coequal societies. So far the government is federal, not national." Mr. M. has, however, previously said, in this same number, that, "the senate derives its appointment indirectly from the people," and this we know to be the case; and it cannot make the slightest difference in the character of the government, whether the senate be the direct or indirect choice of the people, nor does the unequal representation of the people in the senate, make the government the less national. There may be unequal representation in a national, as well as in a federal government.

"The difference between a federal and national government, as it relates to the operation of the government, is, by the adversaries of the plan of the convention, supposed to consist in this, that in the former, the powers operate on the political bodies composing the confederacy in their political capacities; in the latter, on the individual citizens composing the nation in their individual capacities." By stating this distinction without controverting it, Mr. M. admits it to be a sound one. He then says, "on trying the constitution by this criterion, it falls under the national, not the federal character, though, perhaps, not so completely as has been understood. In several cases, and particularly in the trial of controversies to which the states may be parties, they must be viewed and proceeded against in their collective and political capacities only." [In this particular the constitution has since been amended, so that no state is now liable to be sued in any court whatsoever.] "But" continues Mr. M. "the operation of the government on the people in their individual capacities, in its *ordinary and most essential proceedings*, will, on the whole, designate it in this relation, a national government." Now if the action of the government be national *in its ordinary and most essential proceedings*, its federal character, in other respects, is a matter of very little consequence.

Although Mr. M. only cites the trial of controversies to which the states may be parties of the federal action of the government, in which particular the constitution has since been amended, yet there is another very important federal feature in the constitution, and only one, in regard to the action of the government, and

is the clause which relates to the militia. In regard to the militia, the action of the government is upon the states in their political characters, and not upon the militia. Congress may pass laws for training and disciplining the militia, but the state governments must execute those laws, and this they will do or not, as they please. If congress wants the services of a squad of militia, it must ask the state governments for them, and when they are put into the possession of the national government, it can exercise its power over them, and not before. The state governments have the entire control of the militia, and they may comply or not, as they please, with any law congress may pass on the subject. This is a very important federal feature in the constitution. It separates the *sword* from the *purse*, and places the great military arm of the country, beyond the reach of congress, and out of its power.

There have already been some memorable examples of refusal by the state governments to comply with the requisitions of congress respecting the militia. Whether these refusals were right in point of fact, may be doubted; but it cannot be doubted that they had the constitutional right to deliberate and decide. The fact that congress is obliged by the constitution to request of the states, the services of their militia, necessarily implies, that the states have a discretionary constitutional right to comply or not. They have a constitutional right to judge for themselves, whether those contingencies have happened, which authorize congress to call on them for the services of their militia, otherwise the power of congress over the militia would be absolute. So far as the militia, therefore, are concerned, the government of the United States is a federal, and not a national government.

Mr. M. also says, the "idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature." It is surprising, that a writer of Mr. Madison's usual caution and circumspection, should have ventured on so bold an assertion as this. According to this rule, the government of England is not a consolidated national government, for it is the boast of the English nation, that parliament is restrained by their constitution, from legislating on certain subjects. The truth is, a *national government* may be put under as many restraints and

limitations, as the people choose to insert in their constitution. Upon this point Mr. M. has, in the ardor of controversy, pursued his adversaries within the lines of their intrenchments, and thereby subjected himself to total defeat.

Finally, Mr. M. admits, that the action of the government determines its character—that when it legislates for the states, it is federal, and when for the citizens individually, it is national; from which it follows, that the government of the United States is federal with reference to the militia, and national on all other subjects.

But although the militia is the only subject upon which the government of the Union is federal, yet there are other parts of the constitution which relate exclusively to the states in their political character, and are, therefore, strictly federal. The 10th section of the 1st article, and the 1st and 2d sections of the 4th article are of this description. In these sections the people of the several states have stipulated that their respective legislatures shall not do the things therein inhibited, and that they shall do, and permit to be done, the things therein prescribed. If the states comply with these stipulations in good faith, all is well—if not, it is a wrong without a remedy, as congress cannot interfere, except incidentally, in some cases, where the action of the states comes in conflict with an act of congress. Suppose two or more states were to enter into a treaty of alliance or confederation, how is congress to prevent it? Suppose a state were to grant letters of marque and reprisals, would it be guilty of piracy? or coin money or emit bills of credit, would it be, or could it be made guilty of forgery? But I will not pursue these disagreeable inquiries. The vice of confederacies is, that delinquent parties are not amenable to civil process. If obedience or a compliance with stipulations is to be enforced from them, the *ultima ratio regum* must be applied.

To what extent these federal engagements have been violated I will not inquire; but it is very certain that different states are constantly charging each other with these violations. They also indicate the remedy by the oft repeated declaration, "we must stand by our arms." If ever the demon of discord and civil war shall invade our country, it will be through this federal gap in the constitution.

CHAPTER IV.

A DIAGRAM OF THE NATIONAL AND STATE CONSTITUTIONS.

A DISTINGUISHED constitutional lawyer* has said, that he "can make no diagram of the partition of the powers of the national and state governments. He cannot map it out, and say, here is the exact line where the one begins and the other ends. We have no second La Place, and we never shall have, with his *Mechanique Politique*, able to define and describe the orbit of each sphere in our political system, with such mathematical precision. There is no such thing as arranging these governments of ours, by the laws of gravitation, so that they will be sure to go on forever without impinging."

And again he says, "the constitution, by a careful enumeration, declares all the powers that are *granted* to the United States, and the rest are *reserved* to the states. If we pursue to the extreme point, the powers granted and the powers reserved, the powers of the national and state governments will be found, it is to be feared, impinging and in conflict. Our hope is, that the prudence and patriotism of the states, and the wisdom of the national government, will prevent that catastrophe." And for himself, he says, he "will avoid nice, metaphysical subtleties, and all useless theories. He will keep his feet out of *definition traps*, and out of all traps." In other words, he will not define the terms he uses, but will continue to use them at random, lest he should be caught in a *definition trap*.

This is a notable confession for a distinguished constitutional lawyer to make of his inability to distinguish between the powers of the national and state governments.

All this darkness, doubt and uncertainty, arises from a misapprehension of the nature and meaning of a constitution. All the difficulty proceeds from considering the constitution to be in the nature of a *grant*. It seems to be supposed that a constitution is like a deed of feoffment or of bargain and sale. Hence he talks about the powers *granted* to the United States, and the powers *reserved* to the states. Such a view of the constitution may do very well for a conveyancer, but it is altogether unworthy of a statesman.

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* Mr. Webster.

A constitution is not a grant, nor in the nature of a grant. It is not like a deed of feoffment, or of bargain and sale. It has no likeness or similitude to a grant; but it is an instrument *sui generis*—it is a compact—an agreement of the people, that they will have a government of a particular type and character—that they will govern themselves through the instrumentality of certain officers whom they will elect at certain periods from among themselves. These officers are a constituent part of the nation—a mere epitome, or abridgment of the people, and if any grant has been made, they are both grantors and grantees.

All the confusion of ideas about the constitution has arisen from considering it in the light of a grant; and so long as this manner of viewing it is continued, there will be confusion and uncertainty about the powers of the national and state governments. If the constitution be a grant, then it follows necessarily, that those powers which are granted to the national government cannot belong either to the states or the people; and if the states should legislate upon the subjects thus granted, they would be guilty of trespass and usurpation, or of *impinging upon the national powers*; and if congress should legislate upon subjects reserved to the states, then *it* would be guilty of trespass and usurpation: and thus the governments would be in perpetual danger of conflicts. The idea, however, that the people have granted to the national government a bundle of powers with ear marks, and reserved to the state governments another bundle of powers, with their ear marks, and that these powers are so exclusively the property of the respective governments, that neither government can legislate upon powers which belong to the other, without being guilty of trespass, is utterly absurd and ridiculous. But if we view the constitution as a compact—an agreement of the people, that they will govern themselves through the instrumentality of certain officers, whom they will periodically elect from among themselves, and who, of course, can only exercise those powers which belong to the people, for which they need no grant, then all this darkness and uncertainty vanishes, and all is plain and intelligible. Then the power of the government is precisely co-extensive with the power of the people—the government being a mere abridgment of the people.

According to this theory, there can be no possible danger of conflict between the national and state governments—no difficulty in ascertaining *exactly*, not *where*, but *when* the power of the one

begins and the other ends. There is just the same danger, and no greater, that the powers exercised by one government will *impinge* upon the powers exercised by the other, that there is, that portions of the people will enter into conspiracies to oppose the laws of their country—commit treason and rebellion, and overthrow their government. Nor have we to depend upon the *prudence* and *patriotism* of the state governments, nor upon the *wisdom* of the national government, for security against such dreadful catastrophies. The people, in forming their government, had more sense than to place reliance for their security against civil commotions, upon the *patriotism* and *wisdom* of partizan politicians. It would hardly be worth while to form a government, whose existence was to depend upon so frail a tenure. It does not, however, follow, that because congress has power to legislate upon certain subjects, the state governments may not, also, legislate upon the same subjects, in the absence of legislation by congress.

The following is a self-evident proposition, and will not be denied. It is the natural, inherent right of all men, and of every community, to make rules, regulations and laws, for their own government and well being, whenever there is no paramount existing law to prevent or restrain them. Within the limits of this proposition, both the national and state governments may legislate *ad libitum.* Congress may pass any law it pleases, not incompatible with a paramount existing law. The state governments may also pass any law they please, not incompatible with a paramount existing law.

The only paramount existing laws that can restrain congress are: 1st. The laws of God; 2d. The laws of nations, and 3d. The constitution of the United States. Congress has no moral right, although it may have the political power, to pass any law incompatible with either the laws of God or the laws of nations. It has no political power to pass a law incompatible with the constitution.

The state governments are restrained within still narrower limits. They have no right to pass a law incompatible: 1st. With the laws of God; 2d. With the laws of nations; 3d. With the constitution of the United States. 4th. With the laws of congress, and treaties made in pursuance thereof, and 5th. With their own state constitutions. The constitution of the Union is part and parcel of every state constitution. The laws *of congress* are paramount to the laws of the states, for the peo-

ple have said that they shall be the supreme law of the land, and the voice of the people is the law of the land. Whenever, therefore, congress passes a law incompatible with an existing law of a state or all the states, the state laws are thereby superceded and annulled. The power of the states to legislate on any subject ceases, *when* the power of congress begins, and not before. We must therefore inquire *when*, and not *where*, the power of the one government begins and the other ends! In order to ascertain whether the states may legislate upon a given subject or pass a given law, we are not to inquire whether congress *may* pass a law upon the same subject, but we must inquire whether congress *has* passed a law upon the same subject, and one incompatible with the law which the state proposes to pass.

The practical operation of our government from its commencement, has been in conformity to this theory. Congress is specially authorized to regulate commerce among the several states, and yet nineteen-twentieths, if not the whole commerce among the states, except that which is maritime, is, and forever will be, regulated by the state governments. So congress is expressly authorized to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies. It is true, congress has passed a naturalization law; but suppose it had never passed such a law, will it be pretended that the states could not have regulated naturalization within their own limits, and prescribe the terms upon which foreigners should be permitted to hold real property, vote at elections, and be eligible to office? The idea is preposterous. But upon the subject of bankruptcies there is no law of congress, and each state passes its own bankrupt laws, precisely as though nothing was said in the constitution about it. So congress is expressly authorized to coin money, regulate the value thereof, and of foreign coins, and to fix the standard of weights and measures. Suppose congress had never exercised these powers, as it did not for many years (if it has yet) fix the standard of weights and measures; would it not have been competent for the states to have legislated upon these subjects? Must the people of the respective states have continued without a currency — without a standard of value, and without a standard of weights and measures, because congress did not think fit to legislate upon the subject?

The states did fix their own standards of weights and measures for many years, and in the case supposed, they would have had a

right to coin money and regulate the value thereof, and of foreign coins. The same may be said of patents and copy-rights, and of every other subject which congress is expressly authorized to regulate.

So with regard to subjects which congress is not expressly authorized to regulate; such as improving and preserving the navigable waters, and public highways and roads in the United States, and other like subjects which the public good may require. Congress has already spent a good deal of money in removing obstructions from and improving the navigable waters and rivers of the United States, which lie within the limits of the several states. If it can remove such obstructions, it can, upon the same principle, prevent them from being deposited *in* or *across* such waters and rivers, whether done by the elements—by the abrasion of the banks—by individual citizens, or by the authority of state legislatures. Suppose, then, (which, however, is a violent supposition, as every state is interested in preserving its navigable rivers) that a state should authorize the building a bridge or a dam across a navigable river, which would obstruct its navigation. Congress would have the same undoubted right to prevent such obstructions from being made, or to remove them when made, that it would to remove a snag, a sawyer or sunken boat from the Ohio or Mississippi rivers; or to prevent them from falling into the rivers. So if a state should suffer its roads to become foundrous and impassable, or neglect to make a road where the people of the other states required one; congress would have an undoubted right to remove the obstructions, or make a new road, and, if necessary, to pass laws for their preservation. So with regard to every other subject not included within what is erroneously called the *specific grants of power*, but within the express limitations in the constitution. Within this limitation the voice of the nation is the law of the land, and must be obeyed; but until the nation speaks, the states may legislate. Unless expressly prohibited by the constitution, therefore, the power of the state governments to legislate upon any subject, does not cease till the power of congress begins or is exercised.

Our system of government has been hitherto treated as though it was complex, heterogeneous, and incomprehensible; but it is, in fact, simple, homogeneous and intelligible. The obscurity respecting it, has been produced by our commentators, and especially by holyday orators and small lawyers, who were ambitious to

see what was not to be seen, and to display their eloquence and learning in attempting to illustrate what they did not understand. Hence, one set of commentators attempted to illustrate our splendid system of government, by a sublime figure of rhetoric, and therefore, compared it to the solar system. Others attempted to illustrate it by figures drawn from their profession, and therefore, compared it to grants and deeds; all of which, only made it more mysterious and unintelligible. The people, however, who take a common sense, practical view of the subject, see no mystery in it.

To understand the constitution, however, it is indispensably necessary to have a republican heart. No strength of intellect—no extent of learning—no depth of research will ever enable either a nullifier or an aristocrat to understand it, any more than talents and learning will enable an infidel to understand the Bible.

The constitution of the United States was established for three main objects. The first was to make the states a nation or ONE nation. To accomplish this object, it was necessary to have ONE government. The second object was to regulate those subjects which the states could not regulate; such as our foreign relations —our foreign commerce—our domestic maritime commerce—the public safety from foreign and domestic foes—the public domain —the post-office department—the currency—naturalization—weights and measures, &c. &c. Third, to regulate such subjects as the states individually might be interested to regulate, to the detriment or injury of the other states; such as restraints on domestic commerce, between citizens of the different states—obstructions on the rivers and roads—free ingress and egress of citizens of different states, or whatever else the states might attempt to regulate with partiality; but all subjects which the states can regulate as well as congress, and will regulate with impartiality, ought, and no doubt will, forever be left by congress exclusively with the states. The constitution was not established for the purpose of granting power to any set of men to display their skill in legislation, but it was established for the purpose of regulating such subjects as the public good required should be regulated, and which could not be regulated without a government; and within this limit, all legislation ought to be confined.

It is a maxim of common sense as well as of common law, that *omne majus continet in se minus*—the incident follows the principle, unless specially excepted. When the people of the United States, therefore, made themselves ONE nation, by adopting the

constitution and establishing *one* government, all the incidents or powers of national sovereignty followed, unless specially excepted, and the exceptions are contained in the restrictions and limitations which the constitution imposes on the power of congress.

CHAPTER V.

THE POWERS OF GOVERNMENT.

THE sovereign or supreme power of every independent nation is precisely the same—it is the distribution of this power, and the manner in which it is exercised, that constitues all the difference in governments.

There can, theoretically, be but one sovereign power in any government, although that power may be distributed among several agents, or co-ordinate bodies.

For the ordinary purposes of legislation, the supreme power of our government is vested in the president, the vice-president, the senate and house of representatives. The concurrent action of these three bodies constitutes the legislative power of the government, in its strict technical sense. The president and senate are vested with the sovereign or supreme power of the nation, for the purpose of making treaties, which is a species of legislative power, although not usually so called. This would seem to be a violation of the principle, that a nation can have but one head—but one sovereign power; and reasoning *a priori*, we might be led to infer, that it would lead to collision and distraction in the government, as one branch of the sovereign power may nullify the action of the other. Hence the maxim, that to divide sovereignty is to destroy it; and it is no doubt true, that the legislative power may pass a law this year, and the treaty-making power nullify it next year, and so *vice versa*; and this, no doubt, would often happen, were it not that the treaty-making power, although entirely independent of the legislative power, is nevertheless composed of a branch, or rather two branches of the legislative power, and, of course, will always act with due deference and respect to the will of the great legislative power of the nation.

A natural being with two heads would be a monster unfit for *useful action*, and reasoning from analogy, we should infer, that an

artificial being with two heads, would also be a monster, unfit for useful action; but it is wholly impossible to create an artificial being (unless it be a simple monarchy) after the perfect model of a natural one; and hence we find, by experience, that the artificial being, which we call a nation, may, for certain defined purposes, have two heads, or two powers *to will*, and yet their wills never come in conflict.

The first section of the constitution of the United States is in these words, "All legislative power herein granted shall be vested in a congress, consisting of a senate and house of representatives, to be elected," &c. The proposition thus announced, is not true. All legislative power under the constitution, is not vested in the two houses of congress. A very large portion of the legislative power is vested in the president. Congress, it is true, may, in certain contingencies, pass a law in spite of the president; but congress, by the unanimous vote of both houses of congress, cannot pass a law without consulting the president; and vetoing a bill is as much an exercise of legislative power, as assenting to it.

A member of congress who votes against a law, often contributes as essentially to its passage, as those who vote for it. A majority constitutes a quorum to do business in either house. Suppose, then, there is a bare majority present in the house, and a bill is passed by a bare majority of this quorum; is it not manifest, that those who vote in the negative, contribute to its passage as essentially as those who vote in the affirmative? Suppose, instead of remaining in the house and voting *nay*, they should leave the house. Could the bill pass? and if not, then they, by their presence, contribute as essentially to its passage, as though they had voted in the affirmative. A president, then, assists in passing a law, even though he vetoes it and it is afterwards passed by the requisite majorities; but when his veto defeats the bill, his legislative power is still more apparent, although not more real. In short, there is more legislative power vested in the president than in any ten members of either house of congress. It is not, therefore, true that all legislative power is vested in the two houses of congress. The true meaning of the above section is this: All legislative power under this constitution shall be vested in a president, a vice-president, a senate and house of representatives, to be elected, &c.

The words, *herein granted*, in the above section, were improvidently used—*they* have no real meaning, and tend to render the

sentence ambiguous. The whole phraseology of the sec however, is entirely misconceived, and either conveys no m ing at all, or an erroneous one

It is a common opinion, that sovereign power and legisl power are one and the same. Thus Blackstone says, "legisl and sovereignty are convertible terms—the one cannot exist v out the other;" but this is not strictly true. Legislative pow sovereign power, but not the whole sovereign power. The tr making power is a sovereign power, but not a legislative po properly or usually so called. So the sovereign powers is ve in the president, such as the pardoning power, the nomin power, &c. are in no sense the legislative power. Legisl power and sovereign power are not, therefore, synonymous or vertible terms.

Theoretically, the whole sovereign power resides in the pe but practically, it is vested in the government. Although people possess the whole sovereign power, yet they can per no one act of sovereignty, except that of depositing their vot the ballot-box; so that election day is the only day in the ye which the people are practically sovereign; nor can they on one election day exercise the whole sovereign power. The ple exercise that portion of the sovereign power which they in the president once in four years—that portion which they in the house of representatives once in two years, and that w they vest in the senate once in six years, or rather the one of it, on an average of once in three years. In this consists great beauty and safety of our system of government. If people were to exercise the whole sovereign power on the s day, it would cause such a degree of excitement as to endan the safety of the government; but when they exercise their so eign power by piece-meal, at intervals of two, four and six ye it is scarcely possible, that any political storm can rage so lently for such a length of time, as to endanger the safety of government. There is also another powerful sedative of poli excitement in the administration of the government, and tha the length of time that elapses between the election of a new ministration, and the time of its being inducted into office. new president, instead of waiting four months, were to take reins immediately on his election, he would frequently take th especially after a heated contest, under a high state of political *citement, and* would be apt to drive, for a while at least, very

y; but by waiting from November till March, time is afford-
the excitement to subside, both in the president and his par-
This is an admirable feature in our government.
ıas been thought, by some, that our government lacked the
sary strength to sustain itself, and that in some violent po-
contest, it would go to pieces; but the government of the
d States is, in fact, the strongest government ever formed.
more stays, braces and buttresses to keep it steady, than
ther government that ever was conceived by the wit of man;
lthough its machinery is exceedingly complicated, yet its
ı is almost as simple as breathing. The great sovereign—
aster-wheel, has but one simple operation to perform, that
rching on stated days to the ballot-box, and depositing his
which vote is a part only of his sovereign power; and before
ne arrives for depositing the other parts, such a length of
nust elapse, as will either have allayed his excitement or
ed it, if he was under any.
s not easy to describe the sovereign power of a nation—it
whole power of the nation, in whatever way it is exercised.
ırmy—the navy—the judiciary—the police, with all their
idons, exercise portions of the sovereign power.
taphysically speaking, the sovereign power may be divided
ıe power *to will* and the power *to do*. The nation's will is
) be ascertained and made known, and then executed. The
ı or body that announces the will of the nation, exercises
preme or legislative power—those who carry this will into
exercise a subordinate or executive power.
ıin, the supreme or sovereign power is a discretionary pow-
always acts *ex mero motu*, but the subordinate or executive
r, has no discretion—its duty is to execute the will of the
ign.
ere is vested in the president of the United States a compli-
ı of powers. He is invested with a portion of the power *to*
ınd he is the chief of the power *to do*, or the chief execu-
fficer of the nation. He is commander-in-chief of the army
avy, and the head of the whole administrative department.
ercises legislative power conjointly with the two houses of
ess—he also exercises sovereign power in some instances,
own sole discretion, and on his own responsibility. When-
ıe acts for and in the name of the nation, at his own discre-
ıe exercises *the* sovereign power of the nation. In vetoing a

bill, he exercises legislative power, which is sovereign power; in granting reprieves and pardons, he exercises sovereign power, but not a legislative power. In negotiating treaties, he exercises sovereign power, on which the senate have a veto; and when an appropriation is necessary, to carry a treaty into effect, the house of representatives have also an indirect veto. So in nominating to office, the president exercises a sovereign power; so also in removing from office, and in filling up vacancies that happen during the recess of the senate. In convening congress on extraordinary occasions, and in adjourning congress, when the two houses disagree, the president exercises sovereign discretionary power. So also, there are extraordinary exigencies, in the progress of a nation's history, when it becomes necessary for the president to speak and act for, and in the name of the nation, on his own responsibility, and, of course, at his own discretion. Thus general Washington exercised sovereign power, when he issued his memorable proclamation of neutrality, and thereby, no doubt, saved the nation from plunging into the vortex of the French revolution. There was no law of congress requiring this proclamation, and, therefore, the president issued it upon his own responsibility. So Mr. Jefferson's proclamation inhibiting our ports and harbors to English armed vessels, after the attack on the Chesapeake, was a like act of sovereign power. So Mr. Monroe, when he announced to the nations of Europe, that the United States would not permit any interference by them, with the internal affairs of any nation on this continent, spoke for and in the name of the nation, and therefore exercised a sovereign power. The specie circular, and the removal of the deposits by general Jackson, was also an exercise of sovereign power.

But whenever the president carries into effect the ascertained or expressed will of the sovereign power, as he does whenever he carries into effect a law of congress, he acts in a subordinate executive capacity; in other words, whenever his duty is prescribed to him by the constitution, or an act of congress, so as to leave him no discretion, then he acts in a subordinate executive capacity. He acts in his executive capacity in signing commissions and as commander-in-chief of the army and navy.

For the manner in which the president discharges his duty as an executive officer, he may be impeached; but for the manner in which he may exercise his sovereign discretionary power, he cannot *be impeached*. Sovereign power can do no wrong; or if

loes, there is no remedy, except by the people at the ballot-box. If sovereign power could be impeached, it would be no longer sovereign.

If the legislative power should pass ever so bad a law, still it cannot be impeached. So if the treaty-making power make ever so bad a treaty, still it cannot be impeached. If any of the officers concerned in negotiating the treaty, or any of the senators in ratifying it, were guilty of bribery or corruption, they might be impeached for those offences, but not merely for making a bad treaty—that is a mere error of judgment. A president, no doubt, may be impeached for incapacity, for an imbecile man is not fit to be president, and his instructions to his ministers might be evidence of that incapacity; but for a mere error of judgment, he cannot be impeached. So if he nominates ever so unfit a man for office, or vetoes ever so good a bill, there is no impeachment, unless the evidence is sufficient to conviot him of bribery or corruption, for these are high crimes and misdemeanors. But if a president should veto a bill, and it should afterwards become a law, by the requisite majorities, and the president should then refuse to carry it into effect, he might be impeached, for here he acts in his subordinate executive capacity, and must obey the will of the sovereign. So if a president should nominate a judge of the supreme court, and the nomination should be confirmed by the senate, and then the president should refuse to sign his commission, he might be compelled by a mandamus, and also impeached. So if congress should direct a fort to be erected or a ship of war to be built, and the president should neglect, or refuse to execute the law, he might be impeached. So for any *misfeasance* or *nonfeasance*, as commander-in-chief of the army and navy, he may be impeached.

The term *executive* has a substantive meaning in the constitution, and is synonymous with president, and when used as an adjective, it should, by analogy, be synonymous with *presidential*; for if used in its ordinary sense, it conveys a very erroneous idea of the president's power. Thus, the constitution says, "the executive power shall be vested in a president of the United States of America." If the word *executive*, in this sentence, be taken in its ordinary sense, it conveys the idea, that the whole executive power is vested in the president, which is not true, for the whole executive power is the whole administrative power of the nation, from the president down to a tide-waiter. The judicial power is

but a branch of the executive or administrative power. The business of courts of justice is to administer the law, not to make it. A portion of executive power is vested in every man who is engaged in administering or executing the laws. The president, therefore, is the chief of the executive department, but not the whole of the executive department.

It is a very common opinion, that the judicial power is a substantive, independent power in our government; but this is an entire mistake. The judicial power is a branch of the executive or administrative power. The business of courts of justice is, to ascertain and carry into effect, or execute the *will* of the sovereign power. They have, or ought to have, no *will* of their own. Whenever a judge sets up his own will in opposition to the will of the sovereign power, he ought to be impeached, and turned out of office. If this rule were rigidly adopted in practice, it would soon rid the bench of some of its incumbrances.

The power to try impeachments, vested exclusively in the senate, is a sort of *nondescript* power, not easily described. It is not a legislative power, for it makes no laws. It is not an executive power, for it executes no laws. It is not a judicial power, for it is the business of courts to redress wrongs that have been committed; but the business of the impeaching power is to anticipate wrongs, and prevent them from being committed. Thus, if a public officer has done such acts as show him to be unfit for the office he holds; or if he have such disqualifications for the office, as render him unfit for it, such as ignorance, bad habits, bad temper or other vice, the impeaching power anticipates and prevents the injury that might ensue, by removing him from office; but it does not redress any wrong he may have done, nor punish him for doing it: this is left for the judicial power to do. If the president, for example, has been guilty of treason, bribery, or oth er crime or misdemeanor, or becomes imbecile, the impeachir power ascertains the fact, and removes him from office, as unfit hold it, but it leaves him to be punished by indictment for t crime itself. So a judge may he impeached for imbecility, inte perance or other disqualifying habit or vice. The impeachi power, therefore, is a substantive, independent and highly remedi power in our government.

In the impeaching process, the house of representatives perfor a very important part. It is the grand inquest, and also the pr *cuting attorney*, for the nation. The senate is the high

which ascertains the truth of the charge, and pronounces judgment, either of acquittal or of conviction, which is a disqualification, and vacates the office.

In theory, all the officers of government are subject to the impeaching power; but in practice, very few, because the president has a much shorter and less expensive mode of getting rid of an unqualified officer. In practice, therefore, the impeaching process is only applied to such as hold their offices for life, or a certain number of years, and are not removable at the pleasure of the president. But should the president refuse to exercise the power vested in him, in a case where the house of representatives thought it ought to be exercised, the impeaching process may be resorted to in all cases. It is the business of the grand inquest, to take care that the public sustains no detriment, from an incompetent or unqualified officer.

This important duty has not hitherto received that attention which it deserves. It is the practice of the house of representatives to have standing committees upon every important branch of the public service; but it has no standing committee on impeachments. Had there been, in times past, such a committee, whose duty it was to receive complaints and inquire into the capacity and fidelity of the public servants, the public could not, if that committee had done its duty, have been plundered and abused in the manner it has been. It would seem to be quite as necessary that there should be a standing committee on the public officers, as on the public buildings: the one is as liable to corruption, as the other is to dilapidation.

CHAPTER VI.

THE CONSTITUTION OF THE UNITED STATES.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I.

SEC. 1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SEC. 2. The house of representatives shall be composed of members chosen every second year, by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative: and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five, and Georgia, three.

When vacancies happen in the representation from any state,

the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments, until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice-president of the United States shall be president of the senate, but shall have no vote unless they be equally divided.

The senate shall choose their other officers, and also a president pro-tempore, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments: when sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment, in cases of impeachment, shall not extend farther than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SEC. 4. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

The congress shall assemble at least once in every ye such meeting shall be on the first Monday in December, they shall by law appoint a different day.

SEC. 5. Each house shall be the judge of the elections, and qualifications of its own members, and a majority c shall constitute a quorum to do business; but a smaller r may adjourn from day to day, and may be authorized to c the attendance of absent members, in such manner, and such penalties as each house may provide.

Each house may determine the rules of its proceedings, its members for disorderly behavior, and, with the concurre two-thirds, expel a member.

Each house shall keep a journal of its proceedings, an time to time publish the same, excepting such parts as r their judgment require secrecy; and yeas and nays of the m of either house on any question shall, at the desire of one-f those present, be entered on the journal.

Neither house, during the session of congress shall, w the consent of the other, adjourn for more than three da to any other place than that in which the two houses sh sitting.

SEC. 6. The senators and representatives shall receive a pensation for their services, to be ascertained by law, an out of the treasury of the United States. They shall in all except treason, felony, and breach of the peace, be privilege arrest during their attendance at the session of their resp houses, and in going to and returning from the same; and f speech or debate in either house, they shall not be questio any other place.

No senator or representative shall, during the time for he was elected, be appointed to any civil office under t thority of the United States, which shall have been creat the emoluments whereof shall have been increased during time: and no person holding any office under the United S shall be a member of either house during his continua office.

SEC. 7. All bills for raising revenue shall originate in the of representatives; but the senate may propose or concu amendments, as on other bills.

Every bill which shall have passed the house of represen *and the senate*, shall, before it becomes a law, be presented

ident of the United States; if he approve he shall sign it, if not, he shall return it, with his objections, to that house in h it shall have originated, who shall enter the objections at on their journal, and proceed to reconsider it. If after such nsideration, two-thirds of that house shall agree to pass the it shall be sent, together with the objections, to the other e, by which it shall likewise be reconsidered, and if approved wo-thirds of that house, it shall become a law. But in all cases the votes of both houses shall be determined by yeas nays, and the names of the persons voting for and against the shall be entered on the journal of each house respectively. y bill shall not be returned by the president within ten days, days excepted,) after it shall have been presented to him, ame shall be a law, in like manner as if he had signed it, ss the congress by their adjournment prevent its return, in h case it shall not be a law.

very order, resolution, or vote to which the concurrence of the te and house of representatives may be necessary (except on estion of adjournment) shall be presented to the president of United States; and before the same shall take effect, shall be oved by him, or, being disapproved by him, shall be re-pass- y two-thirds of the senate and house of representatives, ac- ing to the rules and limitations prescribed in the case of a

c. 8. *The congress shall have power to lay and collect taxes, du- imposts and excises, to pay the debts and provide for the com- defence and general welfare of the United States; but all duties, ts and excises shall be uniform throughout the United States;*

o borrow money on the credit of the United States;

o regulate commerce with foreign nations, and among the several s, and with the Indian tribes;

o establish a uniform rule of naturalization, and uniform laws e subject of bankruptcies throughout the United States;

o coin money, regulate the value thereof, and of foreign coin, fix the standard of weights and measures;

o provide for the punishment of counterfeiting the securities and ent coin of the United States;

o establish post offices and post roads;

o promote the progress of science and useful arts, by securing, for ted times, to authors and inventors, the exclusive right to their re- ive writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or office thereof.

SEC. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year eighteen hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitulation, or other direct tax, shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

[SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal: coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.]

ARTICLE II.

SEC. 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person

holding an office of trust or profit under the United States, shall be appointed an elector.

* The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate: the president of the senate shall, in presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose, immediately, by ballot, the president. But, in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disabilty of the president.

The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the senate shall choose the vice-president: a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

But no person constitutionally ineligible to the office of presi-

* *I have substituted the amendment of 1802, in place of the original clause.*

dent, shall be eligible to that of vice-president of the United States.

The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services, a compensation which shall neither be increased or diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States."

Sec. 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States: he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the ad-

vice and consent of the senate, shall appoint ambassadors, other ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: But the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SEC. 3. He shall, from time to time, give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and, in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commssion all the officers of the United States.

SEC. 4. The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SEC. 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SEC. 2. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands und

grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SEC. 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SEC. 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SEC. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SEC. 3. New states may be admitted by the congress into this

Union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislature of the states concerned, as well as of the congress.

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SEC. 4. The United States shall guaranty to every state in this Union, a republican form of government, and shall protect each of them againt invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and

judicial officers, both of the United States, and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

[The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.]

Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America, the twelfth. In witness whereof we have hereunto subscribed our names.

GEO. WASHINGTON,
President and Deputy from Virginia.

IN CONVENTION.

MONDAY, SEPTEMBER 17, 1787.

Resolved, That the preceding constitution be laid before the United States in congress assembled; and that it is the opinion of this convention, that it should afterwards be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification: and that each convention assenting to and ratifying the same, should give notice thereof to the United States in congress assembled.

Resolved, That it is the opinion of this convention, that, as soon as the conventions of nine states shall have ratified this constitution, the United States in congress assembled, should fix a day on which electors should be appointed by the states which shall have ratified the same, and a day on which electors should assemble to vote for the president, and the time and place for commencing proceedings under this constitution; that, after such publication, the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the president, and should transmit their votes, certified, signed, sealed, and directed, as the constitution requires, to the secretary of the United States in congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president of

the senate, for the sole purpose of receiving, opening and counting the votes for president; and that, after he shall be chosen, the congress, together with the president, should, without delay, proceed to execute this constitution.

By the unanimous order of the convention,

GEO. WASHINGTON, *President.*

W. JACKSON, *Secretary.*

SEPTEMBER 17, 1787.

SIR:—We have now the honor to submit to the consideration of the United States in congress assembled, that constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired that the power of making war, peace, and treaties; that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the general government of the Union; but the impropriety of delegating such extensive trust to one body of men is evident: hence results the necessity of a different organization.

It is obviously impracticable, in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw, with precision, the line between those rights which must be surrendered, and those which may be reserved; and, on the present occasion, this difficulty was increased by a difference among the several states, as to their situation, extent, habits, and particular interests.

In all our deliberations on this subject, we kept steadily in our view that which appears to us the greatest interest of every true American—the consolidation of our Union; in which is involved our prosperity, felicity, safety—perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the convention to be less rigid on points of inferior magnitude than might have been otherwise expected; and thus the constitution which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every state,

is not perhaps to be expected; but each will doubtless consider that, had her interest alone been consulted, the consequences might have been particularly disagreeable or injurious to others. That it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish.

With great respect, we have the honor to be, sir, your excellency's most obedient and humble servants.

By the unanimous order of the convention.

GEO. WASHINGTON, *President.*

His Excellency the PRESIDENT of Congress.

THE UNITED STATES IN CONGRESS ASSEMBLED.

FRIDAY, SEPTEMBER 28, 1787.

PRESENT—New-Hampshire, Massachusetts, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Virginia, North-Carolina, South Carolina and Georgia; and from Maryland, Mr. Ross.

Congress, having received the report of the convention lately assembled in Philadelphia,

Resolved, unanimously, That the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures, in order to be submitted to a convention of delegates chosen in each state by the people thereof, in conformity to the resolves of the convention, made and provided in that case.

CHARLES THOMPSON, *Secretary.*

AMENDMENTS.

ARTICLE I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ART. II. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ART. III. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ART. *IV. The right of* the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ART. VI. In all criminal prosecutions the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and *to be* informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ART. VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ART. VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ART. IX. The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ART. X. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ART. XI. The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ART. XII. If any citizen of the United States shall accept,

claim, receive or retain any title of nobility, or honor; or shall, without the consent of congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.*

CHAPTER VII.

COMMENTARIES.

ZEAL for the public good was the principal motive which induced most of the members of the convention to undertake the task which had been assigned to them. This accounts for the singular harmony that prevailed throughout their deliberations, and their final success in reconciling the most discordant opinions.

After the convention was organized, it was soon discovered, that the members entertained very different views of the work they were about to commence. Some were for a confederacy, and for re-modeling the old articles of confederation: others were for throwing aside these articles, and commencing on a new foundation, and organizing a national government *de novo*. The question, whether they should form a confederacy, or a national government, was debated, for several days, with great animation, and was finally decided in favor of a national government. As soon as this question was decided, some members left the convention, supposing they were not authorized to form such a government.

But although the convention determined to form a national government, they still continued to act on the federal principle of equality among the states; in other words, they continued to vote by states, each state having one vote, so that Delaware exercised as much power and influence in forming the constitution, so far as voting was concerned, as Virginia, then the largest state. If a state was equally divided on any question, it had no vote. It frequently happened, that a state was represented by a single mem-

* The ten first amendments were proposed by the first congress—the eleventh by the third congress, and the twelfth by the eighth congress. It is now almost forty years since congress has proposed an amendment to the constitution.

ber, and then the state was sure not to lose its vote. On a great many important questions, the vote stood, 7 ayes, 5 noes; or, 5 ayes, 7 noes. The members from New Hampshire did not take their seats till some time in July, and until then, but eleven states were represented in convention, and during this time the votes often stood 6 to 5.* It would, therefore, frequently happen, that a majority of the members would vote in the affirmative, and still the question be carried in the negative, and *vice versa*.

In reading the Madison papers, we are often surprised to find the votes of particular states, so very different from what we should have expected them to be, from our present knowledge of the states.

The debates all took place in convention, and not in committee of the whole, and therefore general Washington always presided. Select committees, however, were often appointed for particular purposes, and these committees were formed of individuals, and not of states. General Washington spoke in convention but once, and then it was to recommend, that after the first census, the representatives should not exceed one for every thirty thousand, *instead* of forty thousand, which was adopted.

When the constitution was finished, all the members signed it but three: colonel Mason and Mr. Randolph of Virginia, and Mr. Gerry of Massachusetts. The principal objection which these gentlemen had to it was, that it had too much of the national, and not enough of the federal principle in it. It should be observed, however, that no two members contributed more to the formation of the constitution than colonel Mason and Mr. Randolph. As soon as the convention resolved to build the government on the national, and not the federal principle, these gentlemen exerted themselves to their utmost, to make the government as perfect as possible upon this principle. The modern mode of opposing a measure, by striving to make it as bad as possible, had not then been discovered.

ARTICLE I.

The preamble to the constitution is a mere act of form, like the *testatum* clause in a deed, and has no efficacy whatever, as a substantive material part of the constitution.

Sec. 1. The phraseology of this section is entirely misconceived, so far as regards the fact which it was intended to announce. All

* There were but twelve states represented in convention, and when *these states* were equally divided; the vote was lost.

legislative power is not vested in a congress, consisting of a senate and house of representatives, but it is vested in a president, a vice-president, a senate and a house of representatives; and where the whole constitution is taken together, it is manifest, that this is what the convention intended to say.

The words *herein granted*, also, are without meaning, as the object of a constitution is to regulate existing power, and not to grant it. As a national government cannot exist without possessing sovereign power, the very act of creating the government confers the power, and, therefore, an express grant is wholly useless.

Sec. 2. The word *citizen* has a popular, and a technical or legal meaning. In popular language it is synonymous with inhabitant. In its strict legal sense, it means a man invested with certain franchises—to wit, the elective franchise, and the office franchise, or the right to vote and the right to hold office. These franchises are confined to adult males, and are inherent in those who are native-born, and are conferred on aliens by naturalization. In this sense women and children are not citizens, and, therefore, it is not necessary for alien women and children to be naturalized, as it would confer on them no additional privileges. An alien-born minor, then, becomes a citizen on arriving at full age, without the forms of naturalization; but quere, would he be eligible to congress at the age of twenty five? Must he not have been seven years a citizen? and was he a citizen before twenty one?

The compromise contained in this section, between the free and the slave states, has been the subject of much discussion; and it has been represented as a boon to the slave states, by allowing a partial representation of the slaves. But this is a most erroneous view of the subject. Directly the reverse is the truth. Slaves are human beings, and occupy the places and consume the food of human beings. Human laws cannot make brutes (if they do chattels,) of what God has created in his own image; and there is no more reason why they should not be counted and weighed in the political scale, than there would be, in not counting and weighing that class of the people who are not allowed to vote in a state where suffrage is not universal. A census has nothing to do with the condition of the people, whether rich or poor, black or white, bond or free.

This celebrated compromise, when placed in its true light, stands thus: *The free states*, in consideration of a full representa-

tion in congress, agree to pay direct taxes in proportion. As there never has been but two direct taxes, and probably never will be another, they enjoy the boon without paying the consideration. The slave states agreed to relinquish a portion of their political weight and power, in consideration of being released from a like portion of direct taxes, and as no direct taxes are ever laid, the consideration is a mess of pottage.

Sec. 3. The senate is organized upon the federative principle of equality among sovereigns, but all its action is upon the national principle. As soon as a senator is elected he becomes a senator of the United States, and not of the particular state that elected him; and he is responsible to the people of the United States, for the faithful performance of his duty, and not to the people, or the legislature, of the state that elected him. The state legislature is *functus officio*, as soon as the senator's credentials of election are signed. The state has no longer any power or control over him during his term of office, nor can it call him to account for any of his misdeeds.

It is true, that some of the state legislatures have attempted to assume an authority over their senators, by giving them instructions how to vote on particular questions; but this is an unconstitutional assumption of power, which the senator may obey or not as he pleases, and which the legislature has no means or power of enforcing. A state legislature has no more power over its own senators, than it has over the senators of any other state. If instructions are given, and the senator thinks proper to obey them, he may do so, and so the senators of any other state, or even the president, may do the same if they please; but if either refuses, the state can do nothing more—it can neither revoke his commission, nor call him to account in any way. It is true, the state may refuse to re-elect him, if he disobeys, and so it might should the senator, when instructed, refuse to worship Baal; and if this proves a constitutional right in the state to control the political action of its senators, it also proves its right to control their religious faith.

It is right and proper for a senator to pay great deference and respect to the opinions of his state legislature; and upon a question where he was in doubt, he would do well to follow the instructions; but upon a question where his own judgment was *clear against the* instructions, he ought not to obey them. The *supple politician*, however, always will, and the senator who has

no opinion of his own, always ought to obey such instructions. The senate is, in many respects, the most important branch of the government, and it ought to be the most independent. Its legislative power is equal to that of the house of representatives. It has a veto on, or is rather a co-ordinate branch of the treaty-making and appointing powers. It is the impeaching power, in the same sense that courts of justice are the judicial power.

But there is another still more interesting, if not more important feature in the constitution of the senate; it is the sheet-anchor of the government, while the other two branches are going through the process of election. The president and the house of representatives are both renewed at the same time, by the elective process, while two-thirds of the senate remain in office during this process. A political storm, therefore, which should entirely revolutionize the other two branches of the government, could not affect the senate in a less period than two years, which would afford time for the storm to subside and the nation to become calm. The senate, also, although in reality the representatives of the people, are yet so remotely elected by them, as not likely to be affected by any sudden impulse the people might feel. These peculiarities and powers constitute the senate the sheet-anchor of the government.

The vice-president, not being permitted to participate in the deliberations of the senate, and having no vote except in case of a *tie*, possesses a very small portion of legislative power. He is a much less important officer in the senate, than the speaker is in the house of representatives. The principal importance of his office consists in the chance it gives him of succeeding to the presidency, in case of the death or removal of the president.

The constitution of the senate was a subject of much debate in convention. The large states resisted the equal representation of the small states, as unequal and unjust. It was alledged that they would combine to defeat measures, which might be of vital importance to the large states. The small states, however, insisted, with great pertinacity, on this equality of representation; and had it not been yielded to them, the probability is, that the convention would have failed in making a constitution. Experience, however, has proved that the apprehensions of the large states, were entirely groundless. The history of the government thus far, affords no instance in which the small states have combined for any purpose whatever. They are as uniformly divided in their

votes as the large states, and this must forever be the case. There is no possibility that the small states can have an interest separate from the large states, unless it be on a question of amendment of the constitution. That a small state like Delaware, should have an equal representation with a large state like New-York, is anti-democratic, but not anti-republican, as both are the representatives of the people.

Whenever a president of the United States shall be impeached, the chief justice will have to preside in the senate; but suppose a vice-president should be impeached, as he may be, who is to preside? It would seem to be very indelicate, if not improper, for the vice-president to preside on his own trial; and yet it would seem he would have a right to do so, if he thought proper. The fact of his being impeached would not vacate his office until judgment was pronounced, and a president pro tem. could not be chosen while he was present.

Sec. 4. Congress has very properly exercised the power conferred by this section. The house of representatives is now elected upon the national, and not upon the federal principle. It would seem to be exceedingly proper that the government should possess and exercise the power of perpetuating itself, and not depend on other governments for its own existence. So long as the house of representatives depended on state legislation for its existence, there was a possibility that the state governments might not do the needful legislation, and so the government would come to an end. It was possible, also, that they might regulate the elections with a view to local interests, or party ascendancy, instead of national interests and the public good: it was all-important, therefore, for congress to take this subject into its own hands.

Sec. 5. This section invests each house of congress, as it was necessary to do, with the sovereign discretionary power of self-government. It enjoins upon each house certain duties, but these duties have no other sanction than the conscience of the house. Suppose either house were to admit an unqualified member, or reject a qualified member, where is the remedy? Suppose the house were to neglect or refuse to keep a true journal of its proceedings, or refuse to enter on the journal, the yeas and nays, at the desire of one-fifth of the members present, what remedy would there be? These injunctions will, no doubt, be substantially complied with; but if they are not, there is no remedy but

by an appeal to the people. Like all other sovereign power, it is not impeachable: if it does wrong, there is no remedy.

A majority of *one* constitutes a quorum to do business, and a majority of *one* of this quorum, may pass a bill. This would seem to be putting it in the power of a minority to legislate; but if a greater number were required to constitute a quorum, it would put it in the power of a minority to defeat and control the majority, by absenting themselves from the house or resigning their seats, and thus paralyzing the action of the majority. Besides, those who are absent are supposed to assent to what the majority does, so that the majority includes all the absent members.

Sec. 6. This section requires no commentary. It is, however, an important provision, as it prevents a man from holding two offices at the same time.

Sec. 7. The first clause in this section is taken from the constitution of the British parliament, where it was exceedingly important that all money bills should be originated by the immediate representatives of the people, who had the money to pay; but there seems to be no particular reason for adopting the same rule in our government, where both houses of congress are the representatives of the people.

The second clause of this section invests the president with the veto power, the exercise of which always produces a high degree of excitement throughout the country. This must of necessity be the case, whenever the veto is applied to a bill of much public interest and expectation; for the veto can only be applied when a majority of both houses of congress, and, therefore, it must be presumed, a majority of the people, are in favor of the bill; and for the president to check the popular current with his veto, cannot fail to produce excitement in proportion to the real or fancied importance of the measure. The exercise of this power, whenever the president does not conscientiously approve of a bill, is a solemn duty, imposed by the constitution, and made sacred by the president's oath of office. He cannot, therefore, with a clear conscience, sign a bill which he does not approve. It is his duty, also, carefully to examine every bill that is presented to him, so as not to perform a solemn duty in ignorance. Such an important and unpopular duty must always be performed with reluctance. It is much easier to go *with*, than *against* the current of public opinion. Whenever a president, therefore, exercises the veto power, it

ought to be presumed that he does it from conscientious and patriotic motives.

As the exercise of this power, upon important bills, must of necessity produce high political excitement, so the power itself, as was to be expected, has been violently assaulted. "One man power," and other opprobrious epithets, have been applied to it. But it can with no propriety be called a *one-man power*.

Whenever the president vetoes a bill successfully, he must be backed by more than one-third of congress, and, of course, more than one-third of the people. A power thus backed cannot, with justice, be stigmatized as a *one-man power*. Besides, if an actual majority of the people are in favor of the measure, the veto cannot defeat it, on an average, for a longer period than two years; for in that time a new election of president will take place, when one may be elected who will not veto the measures, so that the worst exercise of the veto power can only produce a little procrastination. Thus far, the veto power has, no doubt, on the whole, been beneficial to the nation; but whether it has been beneficial or not, there is not the remotest probability that it can ever be stricken from the constitution. The veto power is always exercised in favor of the minority—it is highly beneficial to them; and this minority has also a veto power on the proposed amendments to the constitution. The veto power must, then, remain in the constitution until the minority consent to relinquish their own power, and handcuff themselves.

Sec. 8. The clauses in this section, printed in italics, are merely declarations of the powers which congress, with the concurrence of the president, would or might exercise. They were useful in the constitution, as samples of the powers which the government would exercise, by which the people were enabled to form a more correct idea of the benefits they would derive from the government; but as grants of power, they were wholly supererogatory. The idea of granting sovereign power is itself an absurdity. Sovereign power is not the subject of a grant. The very act of creating a national government, necessarily invests it with practical sovereign power, and with all sovereign power, if there be no limitations in the constitution. A nation cannot exist without a government, and a national government cannot exist without possessing sovereign power. Suppose these clauses in italics had been left out of the constitution. Would congress have had no *power to lay* and collect taxes and imposts, and provide for the

nmon defence? Would the government have had no power borrow money or regulate commerce—no power to coin money punish criminals—no power to declare war or make peace? ıd if not, would it have been a government at all? Would it ve gone into operation or existed a single day? What sort of government is that which can do nothing? which has no power no vitality? and if congress could have exercised any one of ese powers without an express grant, then it could all of them. ence, I conclude that these clauses are not to be considered as ants of power, but merely as declaratory of what would exist, as on as the government was formed, and that congress does not gislate upon these subjects, by virtue of a grant, but by virtue its own inherent power of legislation.

The two clauses in this section, printed in common type, place important limitation on the power of congress over the militia. ıe national government cannot call for the services of the mili-, except for three specified objects, and whether the contingen-es which justify the call, actually exist or not, the state govern-ents will judge for themselves. Neither can congress exercise y authority over the militia in training them, except through the ency of the state governments. With reference to the militia, erefore, the constitution is strictly federal.

Sec. 9. The first clause of this section has become obsolete the lapse of time. Its object was to protect the slave-trade for enty years; but long before the twenty years had expired, all e states had prohibited the trade.

This section contains the principal limitations on the power of ngress. It protects that great palladium of personal liberty, e writ of *habeas corpus*. It prohibits the passage of bills of *at-inder* and *ex post facto* laws. Attainder or *attaint* is a mode of nishing criminals, that has never been adopted in this country, r was there much danger, that it ever would have been, had ere been no prohibition in the constitution. An *ex post facto* w, is one that has a retroactive criminal operation—a law ade to punish an offence already committed. It is often con-unded, even by lawyers, with a retrospective law, but they are idely different. The one has a retrospective criminal operation the other a retrospective civil operation. One affects crimes— e other contracts or civil acts. The former is unconstitutional the latter is not. A legislature that could pass no law that ıould affect the past transactions of men, would have very little

power, and courts of justice would have full scope to set aside as many of the acts of the legislature, as they pleased. Justice often requires that a retroactive law should be passed, but never that an *ex post facto* law should be passed.

Sec. 10. This section, together with the first and second sections of article 4, regulate the federal relations between the states, and, therefore, emphatically constitute the federal part of the constitution. In this article, the people of the several states have stipulated with each other, that their respective state governments shall do certain things, and that they shall not do certain other things. They shall not enter into any treaty, alliance, or confederation with each other, or any foreign state; they shall not grant letters of marque, coin money, emit bills of credit, or keep troops or ships of war in time of peace. Suppose the states were to violate any one or all of these stipulations, where is the remedy? Suppose two or more states were to enter into a treaty of alliance or confederation, what could congress do? If this stipulation has not been violated, at least some bold attempts have been made to violate it, in different sections of the Union. These may be called imperfect obligations, which the states must judge of, for themselves, and if there be divers judgments, there is no remedy but the sword.

This section also prohibits the states from making "any thing but gold and silver a tender in payment of debts, and from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The states cannot violate these provisions of the constitution without affecting individual claims and divesting individual rights, and thereby laying the foundation for a civil action, and thus enabling courts of justice to pass collaterally upon the law; but when the unconstitutional act of a state does not lay the foundation for a private suit, it cannot be brought before the courts of the United States for adjudication. Both the national and state governments are prohibited from passing bills of attainder and *ex post facto* laws, but the states only are prohibited from passing laws impairing the obligation of contracts. Why this diversity? If congress is permitted to pass a law impairing the obligation of a contract between two or more citizens of a state, why should not the state legislature be permitted to do the same thing? If such a law be either right or wrong in one case, it is equally right or wrong in the other.

It has been supposed that this clause was inserted for the par-

pose of restraining the states from passing insolvent laws. But this certainly could not have been its object. It ought not to be presumed, without the clearest proof, that the people intended to divest their state legislatures of so important a branch of their sovereignty. Besides, immediately after the adoption of the constitution, all the state governments commenced passing insolvent laws, and continued to do so, for thirty years, without its being suspected by any body, that such laws were unconstitutional. This is conclusive proof, that the clause was not adopted in that sense. This clause was probably inserted in compliance with the 4th article of the treaty of 1783. That article provides for the collection of the British debts, which had been suspended during the war. The British government complained that the states had prevented the collection of these debts, in violation of this article. The states denied the charge, and the general government, that is, the old confederation, replied, that they had no control over the state governments, and this the British government knew when it made the treaty of peace. It is, therefore, probable, that this clause was intended to restrain the state legislatures from passing any law that should impair the obligation or prevent the collection of these debts (many of which were still unpaid,) when the debtor was able to pay them; but it could not have been intended to prohibit the states from discharging these and other debtors by an insolvent law, when unable to pay them. The clause was put in general terms, for the purpose of applying to all debts of like character, in case of another war with England or any other country.

Every contract to be legal must be possible, and whenever its performance becomes impossible, its obligation becomes void; and of this, it is the legitimate right of every independent government to judge; and upon this principle insolvent laws are based. To prohibit a state from passing insolvent laws, is therefore, to prohibit it from exercising one of the essential rights of sovereignty.

No man is ever supposed to have made an unconditional executory contract. It is not for man to make unconditional stipulations for the future. Hence, in every executory contract there is an implied condition, that its performance shall remain possible, or not incompatible with paramount duties. This is so universally true, that it need not be expressed—the law implies it. Thus, if a man stipulates to do a certain thing at a future day, he need not add, if I

live, ama ble, or God willing; for this is always understood. An insolvent law, therefore, which provides that a debtor shall be discharged from his contracts and obligations, upon his giving up all his property for the use of his creditors, does not impair, or violate the obligation of these contracts, but carries them into effect, according to their express and implied conditions. An insolvent law is, therefore, in perfect accordance with natural law and common justice; and the contrary doctrine, which should hold a man perpetually bound by a contract, the performance of which had been rendered impossible by contingencies which he could not control, would be grossly unjust.

This section also prohibits the states from laying imposts or collecting any revenue from imports, and also provides, that if any such revenue is collected, it shall belong to the United States; and yet this provision has been, and is violated by every maritime state of the Union. An auction-duty on imported goods is a duty on imports, and every importing state lays such a duty. The auction duties in New York amount to three or four hundred thousand dollars a year. This gives New York a great advantage over the other states, that have no such source of revenue; and if New York has a right to lay a duty of one-half per cent. on sales of foreign goods at auction, she has a right to lay a duty of five per cent., if she thinks proper to exercise it. But the states interested in this unconstitutional duty, are probably too strong for the national government; and so it will have to be submitted to. This article, however, provides, in express terms, that the net produce of all duties which the states shall lay and collect on imports shall be for the use of the national treasury. Should the president, then, direct suits to be brought against the states, to recover these auction duties, it would raise a very interesting question, and afford the supreme court an oportunity to settle an important question of constitutional law. Whether it be the duty of the president, as the guardian of the constitution and laws, to commence such suits, the president must, of course, decide for himself.

ARTICLE II.

The constitution of the presidency, gave the convention more trouble than any other part of the instrument. The mode of election, the term of office, and the powers with which the president should be invested, were all subjects of earnest and protracted discussion; and well they might be, for it was necessary to invest *him with vast* power. Some proposed, that the president should

be elected by the state legislatures—others, that he should be elected by the two houses of congress—others, by the senate alone. Some were for electing him upon the national principle—others upon the federal principle. Some were for clogging him with a council, others for giving him the sole power, and making him alone responsible for its exercise. Some were for making his term of office seven years, and disqualifying him for re-election; and a resolution, to this effect, was passed; but it was afterwards reconsidered and the term fixed at four years. The question, whether he should be eligible for a second term, was very much discussed, and had it not been for an unwillingness to exclude general Washington from a second term, it is believed that the exclusion would have been adopted. It was finally determined that the president should be elected upon the federal principle, by means of electors, to be chosen by the direction and under the authority of the state legislatures; but the principle of equality among sovereigns was abandoned, and each state was to have a vote in proportion to its numbers, that is, equal to its representation in congress. But if these state-colleges fail to elect a president, then the election devolves on the house of representatives, when the federal principle, of equality among sovereigns, is again adopted. In this complicated way, was this knotty question finally settled. But as soon as the president is inducted into office, he becomes the president of the people of the United States, and not of the states. He is not responsible to the states for any of his acts; but to the people of the United States he is responsible, for they can impeach him and turn him out of office. Although the states, therefore, elect the president, yet they are *functus officio*, as soon as he is inducted into office.

It has been thought by some, that this was a defective mode of electing the president; that as he is the president of the people, he ought to be elected upon the national, and not the federal principle; and this, it has been proposed, should be done, by having the electors of president elected by districts, and for all the electors to assemble at Washington for the purpose of electing the president, and to continue balloting until they should succeed in electing him. This, it is said, would bring the election home to the people—would do away with the necessity of party conventions, to nominate candidates and to form electoral tickets for the states, as each district would select its own candidate for elector. This system would prevent the election from ever devolving on the

house of representatives, and also prevent a president from being elected by a minority vote. On the present system, it may happen, that one candidate will receive a majority of the electoral votes, and his opponent receive a majority of the popular votes.

The principal objection to this plan is, that the assembling of the electoral college at Washington, would excite too intense an interest in the public mind, which would instigate intrigue and cabal to a much greater extent than exists under the present mode.

SEC. 1. The meaning of the first clause in this section is simply, that there shall be a president of the United States of America. It does not mean that the whole executive power shall be vested in the president, as the language of the clause would seem to imply, because that is not the fact. The president is the chief executive officer, but he is not invested with the whole executive power, for a large portion of the executive power is vested in the judiciary department, over which the president has no control, except to nominate the judges.

The time has now elapsed, when it was possible for any but a natural born citizen ever to become president of the United States. In case of the death or removal of the president, the vice-president succeeds to the office; and in case of the death or removal of the vice-president, congress is authorized to provide a successor; and congress has provided, that the president *pro-tempore* of the senate shall be his successor, and in case of his death or removal, the speaker of the house of representatives is to succeed to the presidency. Hence it is, that the vice-president always absents himself from the senate a few days, before the adjournment of congress, for the purpose of enabling the senate to elect a president pro-tem., who holds his office during the recess of congress; otherwise, if the president and vice-president should both die during the recess, there would be no president of the senate to succeed to the presidency.

SEC. 2. As the chief executive officer of the United States, the president is commander-in-chief of the army and navy. The business of the army and navy is, to protect, preserve and execute the laws of the United States. They are, therefore, a branch of the executive power, of which the president is the head.

The constitution makes no provision for what is called the president's cabinet. It provides him with no *constitutional advisors*. It leaves him entirely free to take counsel of whom he pleases. It authorizes him "to require the opinion, in writing, of the

principal officer in each of the executive departments;" but it does not say what shall be an executive department, nor how many there shall be; nor did he need any authority from the constitution to enable him to require the opinion, in writing, either from the principal, or any subordinate officer in a department, so long as the officer holds his commission, *de bene placitum*, as all the heads of department do. Such a requisition would have been promptly complied with, whether authorized by the constitution or not, unless the officer was ready and willing to be turned out of office. The president is responsible for the execution of the laws, and congress may provide as many assistants as it thinks proper, or as may be necessary. There may be four executive departments, or there may be ten, or any other number, and the president may form a cabinet, on consulting council, of all or any number of the heads of these departments, or he may take counsel of whomsoever else he pleases.

The members of the president's cabinet have sometimes been represented as the *constitutional advisors* of the president, by which is meant, that they have a constitutional right to advise him, and that he is, of course, under a constitutional obligation to follow their advice. Thus the cabinet of the president is made analogous to the cabinet of the king of England. But the analogy is wholly false. In England, the executive power is vested in the ministry, and they are responsible for its exercise, and are liable to impeachment for its abuse. Hence, it is common for the ministry, on going out of office, to procure the passage of a bill of indemnity, against any unconstitutional acts they may have done while in office. Hence, also, if the king refuses to follow their advice, or parliament refuses to adopt their measures, they resign; because they cannot or dare not be responsible for measures which they cannot control. But in our government it is entirely different. The chief executive power is vested in the president, and he, and not his cabinet, is responsible for its exercise. Should he do an unconstitutional act, or neglect a constitutional duty, upon the advice of his cabinet, he might nevertheless be impeached; nor could he screen himself from the penalty, by alleging and proving, that he did it, or left it undone, by the advice of his cabinet. The president may consult his cabinet if he pleases, and it is fit and proper that he should do so; but he may, in all cases, act without consulting them, nor have they any constitutional right to obtrude their advice upon him. So he may consult a member of

congress or other citizen if he pleases, and follow the dictates of his own judgment afterwards. There is, therefore, no analogy between the cabinet of the president and the cabinet of the king of England.

The president being the chief of the executive departments, and responsible for the faithful execution of all the laws, it is fit and proper that he should have the nomination of all the subordinate officers, who are to assist him in the execution and administration of these laws; and, with the exception of the judges, these officers ought, and do, all hold their offices, *de bene placitum*. Responsibility and power must go together. It would, for example, be gross injustice to hold the president responsible for the treasure of the nation, if he had no control over those who guarded the treasury. Hence the power to fill vacancies that may happen during the recess of the senate, has been construed to mean, that the president may create vacancies, by dismissing from office. If the president exercises this power for corrupt purposes, the proper remedy is by impeachment, and not by taking from him the power. Unless the subordinate executive officers are made responsible to the president, there can be no real responsibility, which would be tantamount to a general licence to plunder.

Sec. 3. This section makes it the duty of the president to keep congress informed of the state of the Union, and to recommend such measures as he may judge necessary and expedient. It also makes him responsible for the faithful execution of the laws; and the only way in which he can be made responsible is by impeachment.

Sec. 4. The president, vice-president, and all civil officers, shall be removed from office on impeachment and conviction of treason, bribery, or other high crimes and misdemeanors. High crimes and misdemeanors is somewhat a vague description of offences for which an officer may be impeached. But if a president were to neglect or refuse to execute a law, it would, no doubt, be a misdemeanor within the meaning of the constitution. It would be a misdemeanor in a president, to nominate a man for an office from corrupt motives, for this would be a species of bribery; or to suffer a man to remain in office, who was wholly unfit for it, or was plundering the public, with the knowledge of the president. In short, any act of bad faith towards the public, would amount to a misdemeanor in a president, for which he might be impeached, for such act would show that he was unfit for the high office.

It would be a most fortunate thing for the nation, should a president be impeached and arraigned before the senate, even though the impeachment should not be sustained. It would wake the nation up, and show the people the strength and power of their constitution. There is nothing that does the judiciary so much good, as now and then to impeach a judge. It teaches them their responsibility, and makes them heedful of their duty, and if a president should be impeached, it would teach both him and the people a useful lesson, which they will be long in learning without it; but so long as the president is the chief of the dominant party, there is very little chance of his ever being impeached.

Not only the president and vice-president, but all civil officers may be impeached. The members of congress are civil officers, and therefore, liable to be impeached. This is an important power, and it may yet become necessary to exercise it. Either house may expel a member, for cause or without cause, by a vote of two thirds, but expulsion is not a disqualification. The expelled member may be again returned to the house. Suppose, then, an expelled member should be immediately returned to the house. Must the house be contaminated and the people of the United States be insulted by his remaining in the house? I presume not, but he might be impeached, and if the senate sustained the impeachment, he would be disqualified, and so the house would be rid of him. Or suppose a senator should be guilty of bribery, or other crime, and the senate should refuse to expel him. I presume the house might impeach him, and if the impeachment was sustained, the senate would be purified, and the nation's honor vindicated. This impeaching power is an important power, and it is to be regretted that it is not more frequently exercised.

ARTICLE III.

Sec. 3. The judiciary has generally been considered a substantive independent power in the government; but this is manifestly an erroneous view of it. The business of courts of justice is to administer and execute the laws: they are, therefore, a branch of the executive power, whose business it is to carry into effect the will of the sovereign power. If a nation has a system of laws, courts of justice to administer those laws are indispensable. If, then, a government has a right to make laws, it has, of course, power to establish courts to administer those laws. It was not, therefore, necessary for the constitution to authorize congress to create a

system of courts, but it was all important to establish the tenure of office, and the jurisdiction of the courts.

Sec. 2. The courts of the United States have jurisdiction of all cases in which is involved the constitution, a law of congress, or a treaty; and if a case arises in a state court, in which any of these are involved, such case may be taken from the highest state court to the supreme court of the United States. If this were not so, the state courts would set aside the constitution and laws of congress at pleasure, and there would be no uniformity in the construction of the constitution and laws of congress, in the different states.

There is one inaccuracy in the language of this section. It provides, that the United States courts shall have jurisdiction of controversies between *citizens* of different states. It should have been *inhabitants* or *residents* of different states; for if a man is a citizen of one state, he is a citizen of all the states, or of the United States. There may be inhabitants or residents of different states, but no citizens of different states.

This section also authorized a private citizen to sue a sovereign state; and soon after the constitution was adopted, a private citizen, or perhaps an alien, sued the state of Georgia; and suits were probably commenced against some of the other states. This was an indignity which the sovereign states could not endure, and the constitution was altered, and this right taken away. The supreme court, however, has still jurisdiction of controversies between the states. These controversies can only relate to boundary lines; for it can hardly be supposed that the supreme court would entertain jurisdiction of a suit, by one state against another, for a sum of money, or for damages for a breach of contract. Such a suit would avail nothing if judgment were obtained, for the judgment could not be enforced. Sovereign states are not amenable to civil process.

Sec. 3. This section provides that no attainder of treason shall work corruption of blood. But in the first article of the constitution, congress is prohibited from passing a bill of attainder: what necessity, then, was there for providing that a bill of attainder should not work a corruption of blood?

ARTICLE IV.

This article was copied from the old articles of confederation, *and is a very important article.*

SEC. 1. This section provides, that full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state. This is not merely a provision, as has been generally supposed, for certifying records from one state to another, but its object was to destroy the principle of alienage, and make us one people. It is the cement of the Union; it makes a citizen of one state a citizen of all the states, or of the United States; and a citizen of the United States a citizen of each state. It secures harmonious action among all the state governments, and uniformity of decision among all the state courts, by requiring full faith and credit, that is, full force and effect to be given in each state to all the constitutional laws, and all the constitutional judgments of every other state; and it guarantees this harmonious action in the states, by requiring congress, by general laws, to prescribe the effect of such state laws, and state judgments, in every other state. If a citizen has acquired a constitutional right or immunity in one state, the courts of every other state are bound to give it *full faith and credit*, that is, *full force and effect*, the same as it would have in the state where acquired. If a citizen has obtained a discharge under a bankrupt or insolvent law in one state, courts of justice in every other state are bound to respect it, provided the law under which it was obtained is constitutional; and if the courts in the different states disregard this article of the constitution, it is the duty of congress immediately to pass a law on the subject. The neglect of congress to pass such a law, has already been the means of depriving a good many citizens of their constitutional rights, and was, no doubt, the cause of the late bankrupt law.

SEC. 2. The first clause of this section merely means, that the citizens of each state shall be citizens of all the states, or of the United States. All the *privileges and immunities* of a citizen, constitute citizenship. A man cannot be a citizen of any one state without being a citizen of the United States, or of all the states. Hence, as soon as a man passes from one state to another, he ceases to be under the jurisdiction and protection of the state he has left, and becomes subject to the jurisdiction and protection of the state in which he is, and also of the United States. So, if a citizen goes beyond the territorial limits of all the states, or of the United States, as when he goes to France or England, he is no longer under the protection of any particular state, but of the United States; because he is no longer a citizen of any particular state,

but of the United States. State citizenship, therefore, is confined to the territorial limits of the several states, and no man can claim the protection of any state, except so long as he remains within its limits; and it is an act of usurpation, for a state to attempt to protect those who have been its citizens beyond its own limits. To this general rule, however, of state citizenship there are two exceptions; one in regard to fugitives from justice, the other in regard to fugitives from labor, or runaway slaves. If a man commits a crime in one state and flees to another, the governor of the state from which he fled, may demand him, and the governor of the state to which he fled, is bound to give him up. So, if a slave flees from one state to another, his master may demand him, and the authorities of the state to which he flees, may give him up. But suppose the governor in one case, and the state authorities in the other, refuse to give up these fugitives, what remedy is there? congress cannot make negro-catchers of state officers against their will, nor call them to account for refusing to exercise a power conferred on them by the national government. Unless the state governments, then, make it the duty of their officers to execute the laws of congress, they are not bound to do it. At least, they incur no responsibility by not doing it. These are federal stipulations and engagements, which each state must judge of for itself, and if there be divers judgments, there is no remedy but the sword. All that the national government could do, would be to keep the peace: it cannot settle the dispute. These are troublesome, knotty questions; and whenever they shall come to be practically discussed, they will be discussed too soon. The national government has no direct action upon the states, and, therefore, cannot interfere to settle their controversies, except about territory.

Sec. 3. When a territory wishes to be admitted into the Union as a state, the practice is for the state to form a constitution, and submit it to the inspection of congress for its approval. But this would seem to be a mere matter of form; for as a state can alter its constitution at pleasure, it might, as soon as admitted into the Union, alter its constitution, and make it a very different thing from what it was when submitted to the inspection of congress. Any article, however, which was incompatible with the constitution and laws of the United States, would be void.

The second clause of this section seems to have been unnecessary. Congress must of necessity have had power to make all

needful rules and regulations respecting the territory and property of the United States, nor could the constitution have prejudiced the claims of any state.

Sec. 4. The meaning of this section is not very evident. In the first place, it is not very well ascertained what constitutes a republican government, or what would be anti-republican. Reasoning *a priori*, one would think that a constitution which provides for the perpetuity of slavery was anti-republican; but if a state chooses to have an anti-republican constitution, how is congress to prevent it? The convention probably inserted this section in the constitution *ex abundanti cautela*, without having any very definite idea of what was to be its effect.

ARTICLE V.

The difficulty of amending the constitution is one of its chief excellencies.

If a bare majority could amend the constitution, it would not have been worth making, for it would long before this time have become a parchment of mere party patch-work. Each and every party, as it gained the ascendancy, would have altered the constitution to suit its own purposes and secure its own predominance; but now it is next to an impossibility, for any party to gain such an ascendancy as to enable it to alter the constitution for mere party purposes. Whenever three-fourths of the states or the people, get on one side of a question, it can no longer be a subject of party contest; the disparity is too great for party conflict; it then becomes a national, and not a party question.

There have been but two material amendments to the constitution since it was adopted. One was in the mode of electing the president and vice-president, and the other exempting the states from liability to suits by private individuals. These were important amendments, and the necessity for them was made manifest soon after the government went into operation. As the convention acted upon the federal principle in forming the constitution, so it must be amended upon the federal principle, if amended at all.

ARTICLE VI.

The two first clauses in this article seem to have been superfluous, more especially the first one. A nation cannot get rid of its debts by changing its form of government. The constitution and laws of congress, and treaties made in pursuance thereof, must of necessity have been the supreme law of the land, without any express provision in the constitution. If the constitution is not *per-*

se, the supreme law of the land, nothing which it can say for itself, can make it so; and if the constitution is the supreme law of the land, the laws of congress and the treaties must be so too.

It is an axiom of municipal law, that there cannot exist two incompatible laws, in the same code, or in the same system, at the same time. It follows, therefore, that if a law or a treaty is incompatible with the constitution, such law or treaty is void: but suppose a law of congress and a treaty are incompatible with each other, but not with the constitution, which must prevail? They are both the acts of the supreme power; but being incompatible, they cannot both prevail. If two laws of congress are incompatible, the last law repeals the former, and the rule must be the same in regard to laws and treaties, as they are both acts of the supreme power. This question has, at least, once arisen, although it has not been judicially decided.

In 1841 congress passed a law regulating the duties on French wines, which was incompatible with an existing treaty with France. The law took effect on the first of January 1842, and the treaty expired by its own limitation, on the first of February following. They overlapped each other about a month. This was evidently an oversight by congress, and the secretary directed the duties to be collected in accordance with the treaty. His authority to do this may well be doubted. It is not the business of a secretary, nor even of the president, except by his veto, to revise the acts or correct the mistakes of congress. If congress does not intend to violate a treaty, the proper course would be to insert a clause in the law, saving all treaty stipulations; but if the supreme legislative power thinks proper to pass a law in violation of a treaty, it is not for a secretary to nullify the law.

It may, however, be that this clause was inserted in the constitution for the purpose of settling a question which has very much puzzled some constitutional lawyers and politicians. I mean the question of national and state sovereignty. That there should be national and state sovereignty, both existing at the same time, over the same territory and the same people, seems to some politicians a contradictory and irreconcilable proposition. But there is nothing contradictory or irreconcilable in it. The whole difficulty proceeds from attaching an abstract, absolute idea to the word sovereignty. The idea of sovereignty, however, is susceptible of being qualified by an adjective. Thus we attach very different ideas to *the word sovereignty*, when qualified by the adjectives, state, na-

unicipal or parental. National sovereignty is one thing, ereignty a different thing, and municipal or parental sov- still different things. Whoever makes laws and has) enforce them, exercises sovereignty to the extent of 's. Congress makes laws for the nation, and therefore national sovereignty. A state legislature makes laws ate, and therefore exercises sovereign power to the extent ritory, within the limits of its constitution; and the con- of the United States is a part of its constitution. A city on makes and enforces laws within its charter, to the ex- he city, and therefore exercises municipal sovereignty. and master makes laws for his children and servants, and rce those laws, provided they are not incompatible with the ıe state, and therefore possesses and exercises parental sov- ; and so of the school-master, ship-master, and all other who exercise lawful authority, or have a right to make l the power to enforce them. There is, therefore, noth- adictory or incompatible between national and state sov-

is, however, this universal principle, which applies to all of sovereignty. Whenever they meet or impinge upon object, the lesser sovereignty must yield to the greater. n rightly be no conflict between them. The lesser sove- y have a perfect right to act until the will of the greater ı is known; but when known, it must be obeyed. But, ne limits of the constitution, the greater sovereign is pow- Thus, if Ohio and Kentucky were to build a bridge or a ss the Ohio river, which obstructed its navigation, con- ıuld have a right to remove them, or it might prohibit tion, but until the will of congress was known, the states oceed to build them; but if Ohio were to pass a law, g all reversions after a life estate, or a law declaring that nd in the state of Ohio belonged to the living and not to or that a man's will should be limited to his own life, could not interfere, however unwise or impolitic it might ı law.

ıst clause of this article, makes the constitution of the ıtates part and parcel of every state constitution, so ɜ can be no discrepancy or incompatibility, between the titutions. Thus, if a state forms a constitution which is ible in any of its provisions with the constitution of the

United States, such provisions are void, and the state courts are bound to declare them void, whenever the question arises. So if a law of a state is incompatible with the constitution of the United States, or a constitutional law or treaty of the United States, it is also void, and the state courts are bound by their oaths to declare it so, whenever the case arises. Every state justice of the peace is bound by an oath to support the constitution of the United States, which oath he violates whenever he enforces a law of a state which he either knows or believes to be incompatible with the constitution or laws of the United States; for the constitution is not supported, unless the laws which it authorises are also supported.

This article also restrains congress from requiring any religious test as a qualification for office. This was a sufficient guaranty against any legislation on the subject of religion. So long as no religious test can be required as a qualification for office, there must of necessity be a free toleration of religion.

ARTICLE VII.

This article is no part of the constitution. It is merely an expression of the opinion of the convention, that unless adopted by nine states, or the people of nine states, it had better not be adopted. If, however, any number of the states less than nine, had seen fit to adopt it, they could have done so, and put the government into operation, unless prevented by the old articles of confederation; but these articles were a mere rope of sand, and would not have bound a state a single hour against its will.

Had the constitution been adopted by a small number of states, whose territory was not contiguous, it might have caused much trouble. There might have been difficulty also, about the public lands, which were jointly owned by all the states; but as the constitution has been adopted by the people of all the states, it is useless to speculate about what would have been the consequence of a different course.

The constitution was ratified and signed by the unanimous consent of all the states represented in convention, but not by the unanimous consent of all the members present. Colonel Mason and Mr. Randolph of Virginia, and Mr. Gerry of Massachusetts, refused to sign the constitution. They objected to some of its provisions, and particularly to the constitution of the senate and *the president.* They thought it had too much of the national and *not enough of* the federal principle in it. But as the vote was *taken by states,* and a majority of the members from Virginia and

[assachusetts signed it, the constitution was, of course, ratified y the unanimous consent of all the states present.

AMENDMENTS.

The two amendments to the constitution, relating to the mode f electing the president, and exempting the states from liability) suits, were material and important; but all the other amend- ients, although not objectionable, are not important or material. 'here is no material objection to a law prohibiting a man from iting off his own nose, yet it is not material to have such a law. Vhat possible danger was there that congress would ever pass a law respecting an establishment of religion," or "prohibiting ie free exercise thereof," or "abridging the freedom of speech," r "of the press," or "the right of the people to keep and bear rms," or "quartering soldiers in any house without the consent of ie owner?" What possible danger was there that congress 'ould ever attempt to re-enact the tragedies of Sidney and Rus- ell, by "unreasonable searches and seizures," or the farce of ohn Wilkes, and general warrants? What danger was there that ongress would ever attempt to establish the inquisition, and com- el a man "to be a witness againt himself," or the bastile, for the urpose of depriving a man of his liberty "without due process f law," or deny him "compulsory process for obtaining witness- s in his favor," or "the assistance of counsel for his defence?" Vho can tell what the ninth and tenth amendments mean? Who- ver proposed those amendments must have had very vague, indis- nct perceptions of the evils they were designed to guard against. 'hose who proposed most of the amendments must have supposed iat the people would stand in awe of congress, and be in perpet- al terror of the tyrant's rod; but the fact is, that congress stands i awe of the people, and are in perpetual terror of their rod.

The twelfth amendment is something worse than folly, it is a iece of useless tyranny.

If congress had passed a law prohibiting an officer of the Uni- ed States from accepting any present or emolument from any for- ign prince or power, it would have been very proper, and such a aw would have produced the same effect as the amendment of he constitution, so far as regards the officers of government; be- ause no subsequent congress would ever have repealed the law. But for the constitution to denationalize a private citizen, for ac- epting a present or emolument from a foreign prince, is a useless *iece of barbarity.*

Should one of our scientific and skillful mechanics be employed to build a steam-boat, a bridge, a rail-road car, a magnetic telegraph, or anything else, and should receive pay for it, (which would be an emolument,) or a present as a token of approbation of his skill, he must obtain the consent of congress to keep it, or be denationalized! Such a citizen, if he has spirit in proportion to his genius, will sooner forswear his country than submit to such an alternative. The amendment, after all, amounts to nothing more than an act of congress; because congress is authorised at pleasure to suspend it.

These amendments were all proposed by congress, and they show what sort of a constitution we should have had, if the ordinary race of congressmen had made it. They are not, strictly speaking, amendments, but additions, such as a carpenter would make to a superb edifice, designed by a master architect.

In conclusion, it may be observed, that as all branches of the government are elected by the people, either directly or indirectly, it is republican throughout, but democratic in only one branch, the house of representatives. That the senate is elected upon the federal principle, and the president partly upon the national and partly on the federal principle; but as soon as inducted into office, both the senate and president become the representatives of the nation, and not of the states. That the two parties indigenous to the constitution, are those who are for enlarging the powers of the national government, and limiting the powers of the state governments; and those who are for enlarging the powers of the state governments, and limiting the powers of the national government. One is properly the national republican party, the other the federal republican party. These parties commenced in convention, and will doubtless continue as long as the government lasts.

Men of all parties love power; hence it is natural for the party in power, to think they have not power enough, or at least, none too much; and for the party out of power, to think the party in, has too much. Hence, also, the party in power, are almost necessarily national republicans; and the party out of power, federal republicans. Party names mean nothing; but as the fundamental principle of the government is national, its action cannot be federal, under the administration of any party. So far as the government acts at all, it must act upon the national principle; but it *may refuse to* act upon subjects, which one party thinks belong to *it, and another* party thinks does not, or the contrary, which leaves *a wide field for* contest between the different parties.

CHAPTER VIII.

CONSTITUTION OF OHIO.

Done in convention, begun and held at Chillicothe, on Monday, the 1st of November, A. D. 1802, and of the Independence of the United States the 27th.

We, the people of the eastern division of the territory of the United States north-west of the river Ohio, having the right of admission into the general government, as a member of the Union, consistent with the constitution of the United States, the ordinance of congress of one thousand seven hundred and eighty-seven, and the law of congress, entitled "An act to enable the people of the eastern division of the territory of the United States, north-west of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes;" in order to establish justice, promote the welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish the following constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent state, by the name of *The State of Ohio.*

ARTICLE I.

§ 1. The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people.

2. Within one year after the first meeting of the general assembly, and within every subsequent term of four years, an enumeration of all the white male inhabitants above twenty-one years of age shall be made, in such manner as shall be directed by law. The number of representatives shall, at the several periods of making such enumeration, be fixed by the legislature, and apportioned among the several counties, according to the number of white male inhabitants above twenty-one years of age in each; and shall never be less than twenty-four nor greater than thirty-six, until the number of white male inhabitants of above twenty-one years of age shall be twenty-two thousand; and after that event, at such ratio, that the whole number of representatives shall never be less than thirty-six, nor exceed seventy-two.

3. The representatives shall be chosen annually, by the citizens of each county respectively, on the second Tuesday of October.

4. No person shall be a representative who shall not have attained to the age of twenty-five years, and be a citizen of the United States, and an inhabitant of this state; shall also have resided within the limits of the county in which he shall be chosen, one year next preceding his election, unless he shall have been absent on the public business of the United States, or of this state, and shall have paid a state or county tax.

5. The senators shall be chosen biennially, by qualified voters for representatives; and, on their being convened in consequence of the first election, they shall be divided by lot from their respective counties or districts, as near as can be, into two classes; the seats of the senators of the first class shall be vacated at the expiration of the first year, and of the second class at the expiration of the second year; so that one half thereof, as near as possible, may be annually chosen forever thereafter.

6. The number of senators shall, at the several periods of making the enumeration before mentioned, be fixed by the legislature, and apportioned among the several counties or districts to be established by law, according to the number of white male inhabitants of the age of twenty-one years in each, and shall never be less than one-third nor more than one-half of the number of representatives.

7. No person shall be a senator who has not arrived at the age of thirty years, and is a citizen of the United States; shall have resided two years in the district or county immediately preceding the election, unless he shall have been absent on the public business of the United States, or of this state, and shall have paid a state or county tax.

8. The senate and house of representatives, when assembled, shall each choose a speaker and its other officers, be judges of the qualifications and elections of its members, and sit upon its own adjournments; two-thirds of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members.

9. Each house shall keep a journal of its proceedings and publish them. The yeas and nays of the members, on any question, shall, at the desire of any two of them, be entered on the journals.

10. Any two members of either house shall have liberty to dissent from and protest against any act or resolution which they may think injurious to the public or any individual, and have the *reasons of their* dissent entered on the journals.

11. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member, but not a second time for the same cause; and shall have all other powers necessary for a branch of the legislature of a free and independent state.

12. When vacancies happen in either house, the governor, or the person exercising the power of the governor, shall issue writs of election to fill such vacancies.

13. Senators and representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the general assembly, and in going to and returning from the same; and for any speech or debate, in either house, they shall not be questioned in any other place.

14. Each house may punish, by imprisonment, during their session, any person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in their presence: provided such imprisonment shall not, at any one time, exceed twenty-four hours.

15. The doors of each house, and of committees of the whole, shall be kept open, except in such cases as, in the opinion of the house, require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days, nor to any other place than that in which the two houses shall be sitting.

16. Bills may originate in either house, but may be altered, amended, or rejected by the other.

17. Every bill shall be read on three different days in each house, unless in case of urgency, three-fourths of the house where such bill is so depending, shall deem it expedient to dispense with this rule; and every bill having passed both houses, shall be signed by the speakers of their respective houses.

18. The style of the laws of this state shall be, "*Be it enacted by the general assembly of the state of Ohio.*"

19. The legislature of this state shall not allow the following officers of government greater annual salaries than as follows, until the year one thousand eight hundred and eight, to wit: the governor not more than one thousand dollars; the judges of the supreme court not more than one thousand dollars each; the presidents of the courts of common pleas not more than eight hundred dollars each; the secretary of state not more than five hundred dollars; the auditor of public accounts not more than seven hundred and fifty dollars; the treasurer not more than four hun-

dred and fifty dollars; no member of the legislature shall receive more than two dollars per day during his attendance on the legislature, nor more for every twenty-five miles he shall travel in going to and returning from the general assembly.

20. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state, which shall have been created, or the emoluments of which shall have been increased, during such time.

21. No money shall be drawn from the treasury but in consequence of appropriations made by law.

22. An accurate statement of the receipts and expenditures of the public moneys shall be attached to and published with the laws, annually.

23. The house of representatives shall have the sole power of impeaching, but a majority of all the members must concur in an impeachment. All impeachments shall be tried by the senate, and when sitting for that purpose, they shall be on oath or affirmation, to do justice according to law and evidence: no person shall be convicted without the concurrence of two-thirds of all the senators.

24. The governor and all other civil officers under this state, shall be liable to impeachment for any misdemeanor in office; but judgment in such cases, shall not extend further than removal from office, and disqualification to hold any office of honor, profit or trust, under this state. The party, whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment, and punishment, according to law.

25. The first session of the general assembly shall commence on the first Tuesday of March next; and forever after the general assembly shall meet on the first Monday in December in every year, and at no other period, unless directed by law, or provided for by this constitution.

26. No judge of any court of law or equity, secretary of state, attorney-general, register, clerk of any court of record, sheriff or collector, member of either house of congress, or person holding any lucrative office under the United States, or this state, provided that the appointments in the militia, or justices of the peace, shall not be considered lucrative offices, shall be eligible as a candidate for, or have a seat in, the general assembly.

27. No person shall be appointed to any office within any county, who shall not have been a citizen and inhabitant therein

one year next before his appointment, if the county shall have been so long erected; but if the county shall not have been so long erected, then within the limits of the county or counties out of which it shall have been taken.

28. No person who heretofore hath been, or hereafter may be, a collector or holder of the public moneys, shall have a seat in either house of the general assembly, until such person shall have accounted for and paid into the treasury all sums for which he may be accountable or liable.

ARTICLE II.

§ 1. The supreme executive power of this state shall be vested in a governor.

2. The governor shall be chosen by the electors of the members of the general assembly, on the second Tuesday of October, at the same places and in the same manner that they shall respectively vote for members thereof. The returns of every election for governor shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the speaker of the senate, who shall open and publish them in the presence of a majority of the members of each house of the general assembly; the person having the highest number of votes shall be governor: but if two or more shall be equal and highest in votes, then one of them shall be chosen governor by joint ballot of both houses of the general assembly. Contested elections for governor shall be determined by both houses of the general assembly, in such manner as shall be prescribed by law.

3. The first governor shall hold his office until the first Monday of September, one thousand eight hundred and five, and until another governor shall be elected and qualified to office; and forever after, the governor shall hold his office for the term of two years, and until another governor shall be elected and qualified; but he shall not be eligible more than six years in any term of eight years. He shall be at least thirty years of age, and have been a citizen of the United States twelve years, and an inhabitant of this state four years next preceding his election.

4. He shall, from time to time, give to the general assembly information of the state of the government, and recommend to their consideration such measures as he shall deem expedient.

5. He shall have the power to grant reprieves and pardons, after conviction, except in cases of impeachment.

6. The governor shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the term for which he shall have been elected.

7. He may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed.

8. When an officer, the right of whose appointment is, by this constitution, vested in the general assembly, shall, during the recess, die, or his office by any means become vacant, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the legislature.

9. He may, on extraordinary occasions, convene the general assembly by proclamation, and shall state to them, when assembled, the purpose for which they shall have been convened.

10. He shall be commander-in-chief of the army and navy of this state, and of the militia, except when they shall be called into the service of the United States.

11. In case of disagreement between the two houses, with respect to the time of adjournment, the governor shall have the power to adjourn the general assembly to such time as he thinks proper, provided it be not a period beyond the annual meeting of the legislature.

12. In case of the death, impeachment, resignation, or the removal of the governor from office, the speaker of the senate shall exercise the office of governor until he be acquitted, or another governor shall be duly qualified. In case of impeachment of the speaker of the senate, or his death, removal from office, resignation or absence from the state, the speaker of the house of representatives shall succeed to the office, and exercise the duties thereof, until a governor shall be elected and qualified.

13. No member of congress, or person holding any office under the United States, or this state, shall execute the office of governor.

14. There shall be a seal of the state, which shall be kept by the governor, and used by him officially, and shall be called the great seal of the state of Ohio.

15. All grants and commissions shall be in the name and by the authority of the state of Ohio, sealed with the seal, signed by *the governor*, and countersigned by the secretary.

16. A secretary of state shall be appointed by a joint ballot of the senate and house of representatives, who shall continue in office three years, if he shall so long behave himself well. He shall keep a fair register of all the official acts and proceedings of the governor; and shall, when required, lay the same, and all papers, minutes, and vouchers relative thereto, before either branch of the legislature, and shall perform such other duties as shall be assigned him by law.

ARTICLE III.

§ 1. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, in courts of common pleas for each county, in justices of the peace, and in such other courts as the legislature may from time to time establish.

2. The supreme court shall consist of three judges, any two of whom shall be a quorum. They shall have original and appellate jurisdiction, both in common law and chancery, in such cases as shall be directed by law, provided, that nothing herein contained shall prevent the general assembly from adding another judge to the supreme court after the term of five years, in which case the judges may divide the state into two circuits, within which any two of the judges may hold a court.

3. The several courts of common pleas shall consist of a president and associate judges. The state shall be divided by law into three circuits: there shall be appointed in each circuit a president of the courts, who, during his continuance in office, shall reside therein. There shall be appointed in each county not more than three nor less than two associate judges, who, during their continuance in office, shall reside therein. The president and associate judges, in their respective counties, any three of whom shall be a quorum, shall compose the court of common pleas, which court shall have common law and chancery jurisdiction in all such cases as shall be directed by law; provided, that nothing herein contained shall be construed to prevent the legislature from increasing the number of circuits and presidents after the term of five years.

4. The judges of the supreme court and court of common pleas, shall have complete criminal jurisdiction in such cases and in such manner as may be pointed out by law.

5. The court of common pleas in each county shall have jurisdiction of all probate and testamentary matters, granting ad-

ministration, and the appointment of guardians, and such other cases as shall be prescribed by law.

6. The judges of the court of common pleas shall, within their respective counties, have the same powers with the judges of the supreme court, to issue writs of *certiorari* to the justices of the peace, and cause their proceedings to be brought before them, and the like right and justice to be done.

7. The judges of the supreme court shall, by virtue of their offices, be conservators of the peace throughout the state. The presidents of the court of common pleas shall, by virtue of their offices, be conservators of the peace in their respective circuits, and the judges of the court of common pleas shall, by virtue of their offices, be conservators of the peace in their respective counties.

8. The judges of the supreme court, the presidents and the associate judges of the courts of common pleas, shall be appointed by a joint ballot of both houses of the general assembly, and shall hold their offices for the term of seven years, if so long they behave well. The judges of the supreme court, and the presidents of the courts of common pleas, shall, at stated times, receive for their services, an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit or trust under the authority of this state or the United States.

9. Each court shall appoint its own clerk, for the term of seven years; but no person shall be appointed clerk, except pro tempore, who shall not produce to the court appointing him, a certificate from a majority of the judges of the supreme court, that they judge him to be well qualified to execute the duties of the office of clerk to any court of the same dignity with that for which he offers himself. They shall be removable for breach of good behavior, at any time by the judges of the respective courts.

10. The supreme court shall be held once a year, in each county; and the courts of common pleas shall be holden in each county at such times and places as shall be prescribed by law.

11. A competent number of justices of the peace shall he elected by the qualified electors in each township in the several counties, and shall continue in office three years; whose powers and duties shall, from time to time, be regulated and defined by law.

12 The style of all process shall be, The state of Ohio; and all

prosecutions shall be carried on in the name and by the authority of the state of Ohio; and all indictments shall conclude against the peace and dignity of the same.

ARTICLE IV.

§ 1. In all elections, all white male inhabitants, above the age of twenty-one years, having resided in the state one year next preceding the election, and who have paid, or are charged with, a state or county tax, shall enjoy the right of an elector; but no person shall be entitled to vote, except in the county or district in which he shall actually reside at the time of the election.

2. All elections shall be by ballot.

3. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning from them.

4. The legislature shall have full power to exclude from the privilege of electing, or being elected, any person convicted of bribery, perjury, or any other infamous crime.

5. Nothing contained in this article shall be so construed as to prevent white male persons, above the age of twenty-one years, who are compelled to labor on the roads of their respective townships or counties, who have resided one year in the state, from having the right of an elector.

ARTICLE V.

§ 1. Captains and subalterns in the militia shall be elected by those persons in their respective company districts, subject to military duty.

2. Majors shall be elected by the captains and subalterns of the battalion.

3. Colonels shall be elected by the majors, captains and subalterns of the regiment.

4. Brigadiers general shall be elected by the commissioned officers of their respective brigades.

5. Majors general and quarter masters general shall be appointed by joint ballot of both houses of the legislature.

6. The governor shall appoint the adjutant general. The majors general shall appoint their aids, and other division officers. The brigadiers their majors; the brigade majors their staff officers; commanders of regiments shall appoint their adjutants, quarter masters and other regimental staff officers, and the cap-

tains and subalterns shall appoint their non-commissioned officers and musicians.

7. The captains and subalterns of the artillery and cavalry shall be elected by the persons enrolled in their respective corps, and the majors and colonels shall be appointed in such manner as shall be directed by law. The colonels shall appoint their regimental staff, and the captains and subalterns their non-commissioned officers and musicians.

ARTICLE VI.

§ 1. There shall be elected in each county one sheriff and one coroner, by the citizens thereof, who are qualified to vote for members of the assembly: they shall be elected at the time and place of holding elections for members of the assembly; they shall continue in office two years, if they shall so long behave well, and until successors be chosen and duly qualified: provided, that no person shall be eligible as sheriff for a longer term than four years in any term of six years.

2. The state treasurer and auditor shall be triennially appointed, by a joint ballot of both houses of the legislature.

3. All town and township officers shall be chosen annually, by the inhabitants thereof, duly qualified to vote for members of the assembly, at such time and place as may be directed by law.

4. The appointment of all civil officers, not otherwise directed by this constitution, shall be made in such manner as may be directed by law.

ARTICLE VII.

§ 1. Every person who shall be chosen or appointed to any office of trust or profit under the authority of the state, shall, before entering on the execution thereof, take an oath or affirmation to support the constitution of the United States and this state, and also an oath of office.

2. Any elector who shall receive any gift or reward for his vote, in meat, drink, money, or otherwise, shall suffer such punishment as the law shall direct, and any person who shall directly or indirectly give, promise, or bestow any such reward to be elected, shall thereby be rendered incapable for two years to serve in the office for which he was elected, and be subject to such other punishment as shall be directed by law.

3. No new county shall be established by the general assembly which shall reduce the county or counties, or either of them,

from which it shall be taken, to less contents than four hundred square miles, nor shall any county be laid off of less contents. Every new county, as to the right of suffrage and representation, shall be considered as a part of the county or counties from which it was taken, until entitled by numbers to the right of representation.

4. Chillicothe shall be the seat of government until the year one thousand eight hundred and eight. No money shall be raised until the year one thousand eight hundred and nine, by the legislature of this state, for the purpose of erecting public buildings for the accommodation of the legislature.

5. That after the year one thousand eight hundred and six, whenever two-thirds of the general assembly shall think it necessary to amend or change this constitution, they shall recommend to the electors, at the next election for members to the general assembly, to vote for or against a convention; and if it shall appear that a majority of the citizens of the state, voting for representatives, have voted for a convention, the general assembly shall, at their next session, call a convention, to consist of as many members as there may be in the general assembly, to be chosen in the same manner, at the same places, and by the same electors that choose the general assembly, who shall meet within three months after the said election, for the purpose of revising, amending, or changing the constitution. But no alteration of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into this state.

6. That the limits and boundaries of this state be ascertained, it is declared, that they are as hereafter mentioned—that is to say, bounded on the east by the Pennsylvania line, on the south by the Ohio river, to the mouth of the great Miami river; on the west by the line drawn due north from the mouth of the great Miami aforesaid; and on the north by an east and west line, drawn through the southerly extreme of Lake Michigan, running east, after intersecting the due north line aforesaid, from the mouth of the great Miami, until it shall intersect Lake Erie, or the territorial line, and thence with the same through Lake Erie to the Pennsylvania line aforesaid: Provided, always, and it is hereby fully understood and declared by this convention, that if the southerly bend or extreme of Lake Michigan should extend so far south, that a line drawn due east from it should not intersect Lake Erie, or if it should intersect the said Lake Erie, east

of the mouth of the Miami river of the Lake, then, and in that case, with the assent of the congress of the United States, the northern boundary of this state shall be established by, and extending to a direct line, running from the southern extremity of Lake Michigan, to the most northerly cape of the Miami bay, after intersecting the due north line from the mouth of the great Miami river as aforesaid, thence north-east to the territorial, and by the said territorial line to the Pennsylvania line.

ARTICLE VIII.

That the general, great, and essential principles of liberty and free government may be recognized, and for ever unalterably established, we declare,

§ 1. That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the purpose of protecting their liberties, and securing their independence; to effect these ends, they have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary.

2. There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted; nor shall any male person, arrived at the age of twenty-one years, nor female person, arrived at the age of eighteen years, be held to serve any person under the pretence of indenture, or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a bona fide consideration, received or to be received, for their service, except as before excepted. Nor shall any indenture of any negro or mulatto hereafter made and executed, out of this state, or, if made in the state, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships.

3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can in any case whatever control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support, any place of worship, or

to maintain any ministry, against his consent; and that no preference shall be given by law to any religious society or mode of worship: and no religious test shall be required as a qualification to any office of trust or profit. But religion, morality, and knowledge, being essentially necessary to the government, and the happiness of mankind, schools, and the means of instruction, shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.

4. Private property ought, and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner.

5. That the people shall be secure in their persons, houses, papers, and possessions from all unwarrantable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without probable evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described, and without oath or affirmation, are dangerous to liberty, and shall not be granted.

6. That the printing presses shall be open and free to every citizen who wishes to examine the proceedings of any branch of government, or the conduct of any public officer; and no law shall ever restrain the right thereof. Every citizen has an indisputable right to speak, write, or print, upon any subject, as he thinks proper, being liable for the abuse of that liberty. In prosecutions for any publication respecting the official conduct of men in a public capacity, or where the matter published is proper for public information, the truth thereof may always be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

7. That all courts shall be open, and every person for any injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered without denial, or delay.

8. That the right of trial by jury shall be inviolate.

9. That no power of suspending the laws shall be exercised, unless by the legislature.

10. That no person arrested or confined in jail shall be treated with unnecessary rigor, or be put to answer any criminal charge, but by presentment, indictment, or impeachment.

11. That in all criminal prosecutions, the accused hath a right

to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and, in prosecutions by indictment, or presentment, a speedy public trial, by an impartial jury of the county or district in which the offence shall have been committed, and shall not be compelled to give evidence against himself—nor shall he be twice put in jeopardy for the same offence.

12. That all persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

13. Excessive bail shall not be required, excessive fines shall not be imposed, nor cruel and unusual punishments inflicted.

14. All penalties shall be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. When the same undistinguished severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do with the lightest offences. For the same reasons, a multitude of sanguinary laws are both impolitic and unjust; the true design of all punishments being to reform, not to exterminate mankind,

15. The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law.

16. No *ex post facto* law, nor any law impairing the validity of contracts, shall ever be made; and no conviction shall work corruption of blood, or forfeiture of estate.

17. That no person shall be liable to be transported out of this state, for any offence committed within the state.

18. That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.

19. That the people have a right to assemble together, in a peaceable manner, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances.

20. That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in time of peace are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power.

21. That no person in this state, except such as are employed in the army or navy of the United States, or militia in actual service, shall be subject to corporal punishment under the military law.

22. That no soldier in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in the manner prescribed by law.

23. That the levying taxes by the poll is grievous and oppressive; therefore, the legislature shall never levy a poll-tax for county or state purposes.

24. That no hereditary emoluments, privileges, or honors, shall ever be granted or conferred by this state.

25. That no law shall be passed to prevent the poor in the several counties and townships within this state, from an equal participation in the schools, academies, colleges, and universities within this state, which are endowed, in whole or in part, from the revenue arising from the donations made by the United States for the support of schools and colleges; and the doors of the said schools, academies, and universities, shall be open for the reception of scholars, students and teachers, of every grade, without any distinction or preference whatever, contrary to the intent for which the said donations were made.

26. That laws shall be passed by the legislature which shall secure to each and every denomination of religious societies, in each surveyed township, which now is, or may hereafter be, formed in the state, an equal participation, according to their number of adherents, of the profits arising from the land granted by congress for the support of religion, agreeably to the ordinance or act of congress making the appropriation.

27. That every association of persons, when regularly formed within this state, and having given themselves a name, may, on application to the legislature, be entitled to receive letters of incorporation, to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, and other purposes.

28. To guard against the transgressions of the high powers

which we have delegated, we declare, that all powers not hereby delegated remain with the people.

SCHEDULE.

§ 1. That no evils or inconveniences may arise from the change of a territorial government to a permanent state government; it is declared by this convention, that all rights, suits, actions, prosecutions, claims, and contracts, both as it respects individuals and bodies corporate, shall continue as if no change had taken place in this government.

2. All fines, penalties, and forfeitures, due and owing to the territory of the United States, north-west of the Ohio river, shall inure to the use of the state. All bonds executed to the governor, or any other officer in his official capacity in the territory, shall pass over to the governor, or the other officers of the state, and their successors in office, for the use of the state, or by him or them to be respectively assigned over to the use of those concerned, as the case may be.

3. The governor, secretary, and judges, and all other officers under the territorial government, shall continue in the exercise of the duties of their respective departments until the said officers are superseded under the authority of this constitution.

4. All laws and parts of laws now in force in this territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature, except so much of the act entitled "An act regulating the admission and practice of attorneys and counsellors at law;" and of the act made amendatory thereto, as relates to the term of time which the applicant shall have studied law, his residence within the territory, and the term of time which he shall have practiced as an attorney at law, before he can be admitted to the degree of counsellor at law.

5. The governor of the state shall make use of his private seal, until a state seal be procured.

6. The president of the convention shall issue writs of election to the sheriffs of the several counties, requiring them to proceed to the election of governor, members of the general assembly, sheriffs, and coroners, at the respective election districts in each county, on the second Tuesday of January next, which elections shall be conducted in the manner prescribed by the existing election laws of this territory; and the members of the general assembly, sheriffs, and coroners, then elected, shall continue to

exercise the duties of their respective offices until the next annual or biennial election, thereafter, as prescribed in this constitution, and no longer.

7. Until the first enumeration shall be made, as directed in the second section of the first article of this constitution, the county of Hamilton shall be entitled to four senators and eight representatives; the county of Clermont one senator and two representatives; the county of Adams one senator and three representatives; the county of Ross two senators and four representatives; the county of Fairfield one senator and two representatives; the county of Washington two senators and three representatives; the county of Belmont one senator and two representatives; the county of Jefferson two senators and four representatives; and the county of Trumbull one senator and two representatives.

EDWARD TIFFIN, *President.*

THOMAS SCOTT, *Secretary.*

CHAPTER IX.

COMMENTARIES ON THE CONSTITUTION OF OHIO.

A STATE government is entirely unlike the national government, so far as regards its supreme or legislative power, the sphere of its action, and the subjects upon which it acts. A state government is strictly a municipal or domestic government, confined in its action to the territorial limits of the state. It cannot exercise its sovereign power beyond these limits. The flag of the state of Ohio, which is a symbol of its government, affords no protection to its citizens, beyond the limits of the state; while the flag of the United States, affords protection to its citizens throughout the world. A state can neither declare war nor make peace—negotiate treaties or form alliances. It can neither regulate commerce or pass tariff laws. In short, it can legislate upon no subject, which requires uniformity, throughout the United States. Hence it can have no system of post-offices and post-roads, and ought not to meddle with, or attempt to regulate the currency: all these subjects belong to the national government.

But although the sovereign power of the state is thus limited, yet the power it does possess, is of vast importance to the happiness and prosperity of the people; even more important, (if any

comparison can be instituted between them,) than the powers possessed by the national government. We look to the state government for protection in nearly all our civil rights—the right of private property—of personal security—and every thing which is nearest and dearest to us in the social state. The state governments are, therefore, vastly important, and should be cherished and supported as our choicest birth-right.

ARTICLE I.

This article regulates the legislative power of the state, and vests the whole power in the senate and house of representatives. In this respect, it is entirely unlike the constitution of the United States, which vests a large portion of the legislative power in the president. It limits the number of representatives to seventy-two, and the senators to thirty-six, and provides for taking a census every four years, of all the male citizens above twenty-one years of age, for the purpose of apportioning their representation. It also provides for the election of the senate and house of representatives—their qualifications, &c.; and is so full and explicit, as to require no particular comment. It provides, that each house shall make its own rules, for transacting its business, and the government of its own members. Revenue bills may originate in either house, in which it differs from the constitution of the United States, which requires them to originate in the house of representatives. It also differs from the constitution of the United States, in fixing the maximum of salaries of its officers. With regard to impeachment, it has copied substantially the constitution of the United States. It makes no provision for the crime of treason. That highest offence known to the law, which in former times and in other countries, has furnished so many illustrious victims for the block, has, in our country, nearly become obsolete.

ARTICLE II.

This article regulates the executive department, and provides that the supreme executive power shall be vested in a governor, elected for two years. So far as power, dignity, and emolument are concerned, there is very little analogy between a president of the United States and a governor of Ohio. The constitution has made him the chief executive officer, but has vested in him very little executive or other power. He possesses no legislative power. He may, from time to time, give the general assembly *information of* the state of the government, and recommend such

measures as he shall deem expedient, and so any other citizen may do the same, although the private citizen would have to adopt the form of a memorial, instead of a message. He may grant reprieves and pardons, or in other words, he keeps the key of the penitentiary, and may exercise a sound discretion in letting out the prisoners. "He shall take care that the laws be faithfully executed;" and yet he is vested with no power to take such care. He neither nominates the subordinate executive officers, nor can he remove them from office, or exercise any control over them. He may, it is true, fill vacancies that happen during the recess of the legislature, until the legislature meets, and this is all the power he has over the subordinate executive officers. He may convene the legislature in an extra session, and must state his reason for so doing. He is commander-in-chief of the army and navy of the state of Ohio; but the constitution of the United States prohibits the state of Ohio from "keeping troops or ships of war in time of peace," and she will be very clear of keeping them in time of war, if she has to pay them herself. The governor, then, is simply captain-general of the militia. He may also adjourn the general assembly, when the two houses disagree. He is also the keeper of the seal of the state, and must affix it and sign his name, to such commissions as the general assembly directs. He is, in fact, chief clerk of the legislature, with the title of governor. This article also provides for the appointment of a secretary of state, by the joint ballot of the two houses. The governor is not allowed even to nominate his own secretary.

ARTICLE III.

This article regulates the judiciary, which is, as we have seen, a branch of the executive or administrative department. The judges are appointed on joint ballot of both houses of the legislature, and hold their offices seven years, if they so long behave well. In this, the constitution of Ohio differs essentially from the constitution of the United States, and is probably an improvement upon it. There would seem to be no particular reason why judges, more than other officers, should hold their offices for life, or during good behavior.

Justices of the peace, who constitute a very large portion of the judiciary, are elected by the people in their several townships, for three years. This is a departure from the commonly received notion, that the power that makes the law, and is responsible for

its faithful execution, should have the appointment of the officers, who are to execute it. The judiciary system of Ohio is a very imperfect one. This is in part the fault of the constitution, and in part the fault of the legislature.

Sec. 1. Provides that the judicial power shall be vested in a supreme court,—in courts of common pleas for each county,—in justices of the peace, and such other courts as the legislature may establish. The jurisdiction of these several courts is left entirely with the legislature to regulate, except probate and testamentary matters, and the appointment of guardians, which are given exclusively to the courts of common pleas. These courts have also concurrent jurisdiction with the supreme court over the proceedings of justices of the peace in their respective counties, by writs of *certiorari*.

Sec. 2. Limits the judges of the supreme court to four, and authorizes them to divide the state into two circuits, within which any two of the judges may hold a court. The supreme court has both original and appellate jurisdiction, to be regulated by law.

Sec. 3. Provides that the courts of common pleas shall consist of a president or chief justice, with not less than two, nor more than three associates, any three of whom shall be a quorum with common law and chancery jurisdiction, to be regulated by the legislature. The state is required to be divided into circuits, consisting of one or more counties, and the president judge presides in each county within the circuit, but the associates are confined to their respective counties.

The defect of this system consists in the intermingling of the jurisdiction of the two courts. The supreme court is permitted, by the constitution, to have original and appellate jurisdiction, both of fact and law; the effect of which is, to render nugatory the proceedings of the courts of common pleas in a vast many cases, which wastes a great deal of time, and causes a great deal of useless expense. A court of common pleas should be a *nisi prius* court, in the common law sense of the terms; and the proper business of a nisi prius court, is to ascertain facts, and place them upon the record or roll; and then, if there are any difficult or disputed questions of law arising from those facts, the record or roll is taken to the appellate court for final adjudication; but a trial in a court of common pleas in Ohio, ascertains nothing, and puts nothing upon the record, except what the lawyers *choose to* put there, by their pleadings; and therefore an appeal,

instead of taking up the record only, takes up the whole case to be tried over again by an appellate jury, as well as an appellate court. A court of common pleas in Ohio, therefore, is not a nisi prius court, but merely an experimental court, in which the lawyers break their cases and ascertain their weak points, and thus be prepared with the necessary evidence to fortify them, before the appellate jury. This is like granting a new trial, because the attorney did not understand his case, and bring forward his evidence on the first trial.

The constitution makes no provision for a court of chancery, but it recognizes the existence of such a court, or a court exercising the powers of a court of chancery. The necessity for a court of chancery, or a court with chancery powers, arises solely from some two or three absurd, arbitrary rules of the common law, which ought long since to have been abolished or reformed; and whenever these absurd, arbitrary rules shall be abolished or reformed, there will no longer be any necessity for a court of chancery; because the courts of common law will then be enabled to do the business of a court of chancery, with more facility, and better than a court of chancery itself, for the reason that the mode of proof, by oral testimony in open court, in a common law court, is better than the mode of proof in a court of chancery by written testimony, taken before a commissioner out of court.

The constitution makes no provision for what we call the court in bank, which sits once a year at Columbus. This seems to be merely a court of consultation, in which the four judges of the supreme court assemble for the purpose of deciding those important or knotty questions, which the judges upon their circuits, either do not feel themselves competent to decide, or choose to have the advice of their associates. It would seem that cases can only be taken to the court in bank *ex gratia*, and not *ex debit justicia*.

ARTICLE IV.

This article regulates the right of suffrage, and makes it coextensive in the male sex, with full age, a fair skin, a year's residence in the state, and liability to pay taxes, or work on the roads. The legislature, however, is authorized to exclude persons convicted of infamous crimes, from the right of suffrage. Suffrage must also be performed by ballot, which presupposes, that the voter can read and write; but if he is unable to do this, he must get some person to help him vote.

ARTICLE V.

This article regulates the election of militia officers, and gives to the militia companies the right to elect their company officers—to the officers of battalions, the election of majors—to the officers of regiments, the election of colonels—to the officers of brigades, the election of brigadier generals, and to the legislature, the election of major generals.

ARTICLE VI.

This article provides for the election of sheriffs and coroners by the voters of the respective counties; and of the township officers, by the voters of the several townships. The state treasurer and auditor are elected by the legislature.

ARTICLE VII.

This article provides, that the state officers shall take an oath to support the constitution of the United States; also for punishishing the electors or voters for recieving bribes, and those who offer them. It also regulates the size of counties, which are not to be less than twenty miles square. It also provides for amending the constitution, which is to be done on the recommendation of two thirds of the legislature, which recommendation, the electors or voters must ratify or reject, at the next ensuing election, by voting for or against a convention. If a majority vote for a convention, the general assembly must then, at their next session, call a convention, to be composed of as many members as there are members of the general assembly, and to be elected in the same manner. The convention must then assemble within three months, and proceed to revise and amend the constitution as they think proper; but no amendment can introduce slavery into the state. There is no provision for the ratification of those amendments by the people, and of course the action of the convention is conclusive and final The last clause of the article establishes the boundaries of the state, but these boundaries are, of course, subject to the revision of a higher power.

ARTICLE VIII.

This article is, in part, a bill of rights, and in part a restriction or limitation on the power of the general assembly.

A bill of rights is nothing more than a declaration of opinions, which has no binding force even on those who make the declaration, and much less on any body else. No man is bound to entertain the same opinion to-morrow, on any given subject, that

he does to-day, and no man has a right to tell me, that I must entertain the same opinion that he does, on any subject whatever.

Many of the opinions announced in this article are true, and will, no doubt, forever be recognized as true; but some of them are false, and never have been recognized as true, either by the people, or the general assembly of Ohio. It is not, for example, true, "that all men are born equally free and independent," for they are not born free and independent at all, and do not become free and independent, until they have been born, at least twenty-one years; and we all know, that many do not become free and independent, even then, or ever afterwards. Freedom and independence is a compound right, partly natural and partly civil, which accrues by lapse of time, in pursuance of the laws of nature and the laws of the land. It is the combined action of these laws, which makes a free man or citizen, in the social state. In the savage state, the laws of nature alone, may make a free savage, but not a free citizen.

This article forever prohibits slavery in the state of Ohio. Although there is some fastidiousness in the use of words, yet it is manifest, that its object was, to prohibit negro slavery, in accordance with the ordinance of 1787, passed by the old confederation congress, which prohibits slavery in the then north-western territory, now composing the states of Ohio, Indiana and Illinois. Every body knows what negro slavery is in the United States, and it was that, that the ordinance of 1787 intended to prohibit.

The sixteenth section provides that "no ex-post facto law, or any law impairing the validity of contracts, shall ever be made;" and yet a large portion of the time of every court in the state is occupied in annuling marriage contracts, which would seem to be "impairing their validity," and this is done by provision of statute.

The 17th section of this article prohibits the transportation or banishment from the state of any person for an offence committed within the state; but it does not prohibit the banishment of persons, who have committed no offence, and therefore it is, I presume, that the legislature has made several attempts to banish the negro population from the state.

The 23d section, prohibits the levy of a poll-tax for state or county purposes, and yet poll-taxes for the repair of roads are levied. Are not roads repaired both for county and state purposes? Poll-taxes are also levied on lawyers and doctors, expressly

for county and state purposes. If it be said that the profession is taxed, and not the man or poll, then the same evasion would enable the legislature to tax every mechanic, including wood-choppers, and street-pavers and scrapers, by saying, the occupation or profession was taxed, and not the man or the poll.

The 26th section provides that the "doors of schools, academies, and universities shall be open for the reception of scholars, students, and teachers, of every grade, without any distinction or preference whatever;" and yet such scholars only are admitted, as have fair complexions and straight hair.

The 28th section declares that "all powers not delegated, remain with the people," and therefore the people, it would seem, take the liberty of doing just what they please, through the instrumentality of their delegates to the legislature; from which the inference would seem to be, that this bill of rights is, in fact, only so far obligatory as the legislature chooses to be bound by it.

SCHEDULE.

The schedule attached to the constitution of Ohio, is now entirely obsolete. It was only a provision for changing from the old territorial government to the new state government, and as soon as the new government was launched, or came into being, this schedule became useless and obsolete.